TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 948.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 7, 1899.

(17,457.)

(17,457.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 343.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 7, 1900.

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1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 20th day of May, A. D. 1899.

Present: Chief Justice Hazelrigg and Judges Thos. H. Paynter, A. R. Burnam, B. L. D. Guffy, George Durelle, J. D. White, and J. P. Hobson.

LOUISVILLE AND NASHVILLE RAILROAD Company, Appellant, *vs.* THE COMMONWEALTH OF KENTUCKY, Appellee. } (No. 505.) Appeal from Marion Circuit Court.

Be it remembered that heretofore, to wit, on the 18th day of March, A. D. 1899, the appellant, by counsel, filed in the office of the clerk of the court of appeals of Kentucky a transcript of a record in words and figures following, to wit:

2 Pleas had before the Hon. Chas. Patteson, judge of the eleventh judicial district of Kentucky, at the court-house, in Lebanon, Marion county, Kentucky, on the 25th day of January, 1899, on a trial of indictment No. 505, cause pending in said Marion circuit court, in which The Commonwealth of Kentucky is plaintiff and The Louisville and Nashville Railroad Company is defendant.

Marion Circuit Court, January Term, 14th Day.

12TH DAY OF FEB., 1895.

This day came the grand jury of Marion county, Kentucky, and by its foreman, in the presence of said grand jury, returned the following indictment into open court, endorsed a "true bill," Commonwealth of Kentucky *vs.* The Louisville & Nashville Railroad Company, which is ordered to be filed, and it is ordered that summons on this indictment be issued:

Marion Circuit Court, January Term, A. D. 1895.

THE COMMONWEALTH OF KENTUCKY *against* THE LOUISVILLE & NASHVILLE R. R. Co. } Indictment for Charging More for a Short than a Longer Haul.

3 The grand jury of the county of Marion, in the name and by the authority of the Commonwealth of Kentucky and upon the recommendation of the State railroad commission filed in said court, accuse the Louisville & Nashville Railroad Company of the offense of charging more for a short than for a longer haul, the shorter being included within the longer distance, committed in

manner and form as follows, to wit: The said Louisville and Nashville Railroad Company is now and was on the 17th day of October, 1894, a corporation organized under the laws of this State and a common carrier of freights, operating in this State a line of railroad extending from Altamont, in said State, through the said county of Marion and city of Lebanon to Louisville, in said State, and on said 17th day of October, 1894, before the finding of the indictment herein, the said Louisville & Nashville railroad, in said county of Marion, did transport a car-load of coal from said Altamont to Lebanon, Kentucky, over its said line of road for J. M. Shreve, and did then and there unlawfully charge and receive from the said J. M. Shreve as compensation for the transportation of said car-load of coal twenty-nine and $\frac{14}{100}$ dollars, being at the rate of $1.55 per ton, when for the transportation of similar car-loads of coal under similar circumstances and conditions for a longer distance over the same line of road, namely, from Altamont, Kentucky, to Louisville, Kentucky, and to Elizabethtown, Kentucky, in the same direction, the distance from Altamont, Kentucky, to Lebanon, Ky., being shorter and included within the longer
4 distance, from Altamont, Kentucky, to Louisville, Kentucky, and to Elizabethtown, Kentucky, the said defendant at said time did charge and receive less compensation than $1.55 per ton from various persons at said Louisville, Kentucky, and Elizabethtown, Kentucky, the defendant at said time not having been authorized by the railroad commission of this Commonwealth to charge less for longer than for shorter distances for the transportation of coal, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

H. W. RIVES,
Pro Tem. Commonwealth's Attorney, Eleventh Judicial District.

Witness-:
J. M. SHREVE.
FRANK HARRIS.

COMMONWEALTH OF KENTUCKY
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.
} #505. Indictment for Excessive Freights.

A true bill.

PAUL I. McELROY,
Foreman of the Grand Jury.

1895, February 12th.—Received from the foreman of the grand jury in the presence of the grand jury, and filed in open court.

B. J. LANCASTER,
Clerk M. C. C.,
By HARRY LANCASTER, *D. C.*

5 Marion Circuit Court, April Term, 3rd Day.

24TH DAY OF APRIL, 1895.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order Setting Case for Trial.

This day came parties, by attorneys, and by agreement this cause is set for trial on the 8th day of May, 1895, and the fifteenth term day of the present term of court.

Marion Circuit Court, Special August Term, 10th Term Day.

16TH DAY OF AUGUST, 1895.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement the above-styled action is continued until the next term of this court.

Marion Circuit Court, September Term, 2nd Day.

24TH DAY OF SEPTEMBER, 1895.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued until the next term of this court.

6 Marion Circuit Court, January Term, 2nd Day.

28TH DAY OF JANUARY, 1896.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued.

Marion Circuit Court, April Term, 1st Day.

27TH DAY OF APRIL, 1896.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order of Continuance.

This day came the Commonwealth, by attorney, and on his motion this cause is continued.

Marion Circuit Court, September Term, 2nd Day.

29TH DAY OF SEPTEMBER, 1896.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came the Commonwealth of Kentucky, by attorney, and on his motion this cause is continued.

7 Marion Circuit Court, January Term, 1st Day.

25TH DAY OF JANUARY, 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued.

Marion Circuit Court, January Term, 10th Day.

4TH DAY OF FEBRUARY, 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order Setting Former Order Aside.

This day came the Commonwealth of Kentucky, by attorney, and on his motion the order made at a former day of this term continuing this cause is set aside and held for naught, and on his further motion this cause is set for trial on the 9th day of the next April term of this court, to which time said cause is continued.

Marion Circuit Court, September Term, 1st Day.

27TH DAY OF SEPTEMBER, 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHGILLE RAILROAD Company. } Order of Continuance.

8 This day came parties, by attorneys, and by agreement this cause is continued.

Marion Circuit Court, Special December Term, 1st Day.

6TH DAY OF DEC., 1897.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order of Continuance.

This day came parties, by attorneys, and by agreement this cause is continued until January term of this court.

Marion Circuit Court, January Term, 4th Day.

27TH DAY OF JANUARY, 1898.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD Company. } Order Overruling Motion for Continuance.

This day came the defendant, by its attorneys, and produced an affidavit, properly verified, which was ordered to be filed, and moved the court to continue this case, and the court, being advised, overruled the motion, to which defendant excepted, and the said cause is set for trial on the 14th day of the present term, and alias subpœnas are ordered to issue for the Commonwealth witnesses and for C. C. McChord in Franklin county, Kentucky, in this case, to which defendant excepted.

9 Marion Circuit Court, January Term, 20th Day.

15TH DAY OF FEBRUARY, 1898.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Order Overruling Motion to Elect.

This day came parties by attorneys, and the defendant entered a general demurrer to the indictment herein, and the court, being advised, overruled the demurrer; to which defendant, by its attorneys, objected and excepted.

Then came the defendant and filed its written motion requiring the Commonwealth to elect whether it will prosecute the defendant for the alleged offense of charging more for hauling from Altamont to Lebanon than from Altamont to Elizabethtown or for the alleged offense of charging more for hauling from Altamont to Lebanon than from Altamont to Louisville, and the court, being advised on said motion, overruled same, to which the defendant excepted and entered a plea of not guilty. Then came the following jury, T. M. Clark, W. T. Cook, William Hayden, J. B. Hundley, T. B. Mattingly, G. W. McElroy, Sim O'Daniel, Richard Smith, Prior Swiggert, W. W. Thomas, W. H. Thurman, and R. L. Weatherford, who were duly sworn to try the issue, and, not having time to complete the trial, were adjourned by the court till tomorrow morning at eight o'clock.

10 Marion Circuit Court, January Term, 21st Day.

16TH DAY OF FEBRUARY, 1898.

Court met pursuant to adjournment, Hon. Charles Patteson, circuit court judge, being present.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE R. R. COMPANY.

This day came parties, by attorneys, and thereupon came T. M. Clark and eleven others, the jury heretofore empaneled and sworn to try the issue, and at the close of plaintiff's testimony the defendant, by its attorney, moved the court to instruct the jury to find for the defendant, and the court, being sufficiently advised, overruled the motion; to which the defendant, by its attorneys, objected and excepted, and, not having time to complete the trial, the jury was duly admonished by the court and adjourned until tomorrow morning at 8 o'clock.

Marion Circuit Court, January Term, 22nd Day.

17TH DAY OF FEBRUARY, 1899.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

This day came parties, by attorneys, and thereupon came T. M. Clark and eleven others, the jury heretofore empaneled and
11 sworn to try the issue, and, not having time to complete the trial, were duly admonished by the court and adjourned until tomorrow morning at 8 o'clock.

Marion Circuit Court, January Term, 23rd Day.

18TH DAY OF FEBRUARY, 1898.

Court met pursuant to adjournment, Hon. Chas. Patteson, circuit court judge, being present.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

This day came parties, by attorneys, and thereupon came T. M. Clark and eleven others, the jury heretofore empaneled and sworn to try the issue, and at the close of all the testimony the defendant renewed its motion to the court to instruct the jury to find for the defendant, and the court, being advised, overruled the motion; to which the defendant, by its attorneys, objected and excepted, and after hearing all the evidence, argument of counsel, and receiving the instructions of the court, retired and returned into court and announced to the court that they had and could not agree upon a verdict. Thereupon the court discharged the jury from further consideration of the case, and the cause was continued.

12 Marion Circuit Court, April Term, 2nd Day.

26TH DAY OF APRIL, 1898.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Order of Continuance.

This day came parties, by attorneys, and on their motion this cause is continued.

Marion Circuit Court, January Term, 2nd Day.

24TH DAY OF JANUARY, 1899.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Order Empaneling Jury.

This day came parties, by attorneys, and the defendant entered a plea of not guilty, and thereupon came the following jury: John R. Johnson, J. M. Cissell, R. C. Miburn, J. W. Helm, B. F. Abell, E. M. Roney, A. Q. Hardesty, John Harrison, Maurice Doody, Jr., J. C. Jarboe, G. W. Raley, and J. A. Wayne, who were duly sworn to try the issue, and, not having time to complete the trial, were adjourned until tomorrow morning at 9 o'clock.

Marion Circuit Court, January Term, 3rd Day.

25TH DAY OF JANUARY, 1899.

Court met pursuant to adjournment, Hon. Chas. Patteson being present.

13 Circuit court judge being present.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Judgment.

This day came parties, by attorneys, and thereupon came M. Doody, Jr., and eleven others, the jury heretofore empaneled and sworn to try the issue, and after hearing the evidence, argument of counsel, and receiving the instructions of the court, retired and returned into the court the following verdict: "We, of the jury, find the defendant guilty and fix the fine at three hundred dollars ($300.00). M. Doody, Jr., one of the jury." It is therefore adjudged that the Commonwealth recover of the defendant the sum of three hundred dollars and its costs herein expended, for which execution may issue. (See page 152, bill of exceptions, copy of same verdict and judgment.—Clerk.)

Marion Circuit Court, January Term, 5th Day.

27TH DAY OF JANUARY, 1899.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } Order Filing Grounds for New Trial.

Came defendant, by its attorneys, and filed written motion and grounds for new trial herein and moved the court to set aside the verdict and judgment herein and grant a new trial, and, to be advised, the court took time.

14 Marion Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD Company. } Motion and Grounds for New Trial. (Indictment # 505.)

The defendant moves the court to set aside the verdict and judgment herein against it, and to grant it a new trial herein, and for grounds of said motion says:

1. That the court erred in sustaining the objection of the Commonwealth to each of the 4th, 5th, and 15th questions propounded by the defendant to the witness S. R. Knott, and in refusing to permit said witness to answer said questions or any of them, and in so doing the court, with respect to each of said questions and each of said answers, decided against the right and immunity then

and there specially set up and claimed by the defendant at the time of the propounding of each of said questions, under section 1 of article 14 of the amendments to the Constitution of the United States and under subsection 1 of section 10 of article 1 of the Constitution of the United States.

2. That the court erred in sustaining the objection of the Commonwealth to the 6th question propounded by the defendant to the witness S. R. Knott, and in refusing to permit said witness to answer said question, and thereby the court decided against
15 right and immunity then and there specially set up and claimed by the defendant under subsection 3 of section 8 of article 1 of the Constitution of the United States and under the act of Congress of Feb'y 4th, 1887, entitled "An act to regulate commerce."

3. That the court erred in sustaining the objection of the Commonwealth to each of the 7th, 8th, 9th, 10th, 12th, 13th, and 14th questions propounded by the defendant to the witness S. R. Knott and in refusing to permit said witness to answer said questions or any of them.

4. That the court erred in sustaining the objection of the Commonwealth to each of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th questions propounded by the defendant to the witness J. B. Atkinson and in refusing to permit said witness to answer said questions or any of them.

5. That the court erred in sustaining the objection of the Commonwealth to each of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th questions propounded by the defendant to the witness W. A. Pugh and in refusing to permit said witness to answer said questions or any of them.

6. That the court erred in sustaining the objection of the Commonwealth to each of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th questions propounded by the defendant to the witness C. S. Nield and in refusing to permit said witness to answer said question- or any of them.

16 7. Because the court erred at the conclusion of the testimony for the Commonwealth in refusing to instruct the jury peremptorily to find for the defendant, as requested by the defendant.

8. Because the court erred in refusing at the conclusion of all the evidence to instruct the jury peremptorily to find for the defendant, as requested by the defendant, and in so doing the court decided against the defendant's contention that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes were void because in conflict with section 1 of article 14 of the amendments to the Constitution of the United States, and subsection 1 of section 10 of article 1 of the Constitution of the United States, and subsection 3 of section 8 of article 1 of the Constitution of the United States, and the act of Congress of February 4th, 1887, entitled "An act to regulate commerce," and decided in favor of the validity of said section 218 of the constitution of Kentucky and of section 820 of the Kentucky Statutes.

9. Because the court erred in giving to the jury, on motion of the Commonwealth, instructions numbered 1 and 3 and each of them, and erred in not instructing the jury properly as to the whole law of the case.

10. Because the verdict is against the law.

11. Because the verdict and judgment are based upon a construction of the law of Kentucky which necessarily makes that
17 law contrary to section 1 of article 14 of the amendments to the Constitution of the United States, and subsection 1 of section 10 of article 1 of the Constitution of the United States, and subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with the act of Congress of February 4th, 1897, entitled "An act to regulate commerce."

W. J. LISLE,
W. C. McCHORD,
WALKER D. HINES,
Attorneys for Def't.

Filed in court January 27th, 1899.

B. J. LANCASTER, *Clerk.*

Marion Circuit Court, January Term, 11th Day.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order Overruling Grounds for New Trial, Granting an Appeal, Filing Bill of Exceptions.

3RD DAY OF FEBRUARY, 1899.

The court, being advised, overruled the motion and grounds for new trial filed herein on a former day of this term, to which defendant excepted and prayed an appeal from the judgment herein to the court of appeals, which is granted upon the condition that the record be lodged in the clerk's office of the court of appeals within sixty days after the judgment. Thereupon defendant tendered herein its bill of exceptions, which was examined and approved and signed by the judge and is hereby filed and made part of the record.

18 Marion Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.
Indictment. No. 505.

Bill of Exceptions.

LEBANON, KY., *January 24th*, 1899.

Be it remembered that, this cause coming on this day for trial, the jury was duly impaneled and sworn, the case was stated by

counsel for the Commonwealth to the jury, and the defendant entered a plea of not guilty.

The court thereupon adjourned.

LEBANON, KY., *January 25th*, 1899.

The court met pursuant to the adjournment.

Counsel for the Commonwealth thereupon offered in evidence certain reports of the railroad commission of Kentucky to the Marion circuit court.

To the introduction of said reports in evidence the defendant, by counsel, objected. The court overruled said objection; to which the defendant, by counsel, excepted.

Counsel for the Commonwealth thereupon read said reports in evidence to the jury in words and figures as follows, to wit:

"OFFICE OF RAILROAD COMMISSIONERS,
FRANKFORT, KY., *Dec'r 5th*, 1894.

Board met pursuant to call of the chairman.

19 Present: C. C. McChord, chairman; Chas. B. Poyntz, Urey Woodson.

At a meeting of the commission held the following order was made and entered, viz:

Complaint having heretofore been made to this board of railroad commissioners by the Commercial Club of Lebanon, Kentucky, against the Louisville and Nashville Railroad Company, charging said company with violating and continuing to violate section 218 of the constitution of Kentucky and 280 of the Kentucky Statutes in the matter of charging and receiving a greater compensation in the aggregate per ton for the transportation of coal by said company originating from the various coal mines upon the Knoxville branch and connecting branches of said railroad in Kentucky to Lebanon, Kentucky, than is charged and received by said company on a like commodity originating at or from said points and transported over the same line to Louisville, Kentucky, a greater distance, the shorter being included in the longer distance, and the commission, having invested said complaint and being now advised, find that said complaint is well taken; that said facts are true, and therefore declines and refuses to exonerate said company from the provisions of said sections of said Constitution and statute and from said acts, and now orders that said company desist and refrain from charging, collecting, or receiving a greater sum

20 in the aggregate per ton on said Knoxville branch and connecting branches of said company's road upon all shipments of coal to Lebanon, Kentucky, from said mines than it charges, collects, or receives for a like commodity originating at or from said mines and transported over said line to Louisville, Kentucky. The commission reserve the right to suspend the operation of this order should said company reduce its rates on said commodity from said points of shipment to Lebanon, Ky., such reduced rates to be approved by this board.

It is further ordered that a copy of this order be mailed to said company and said complainant.

C. C. McCHORD, *Chairman.*
UREY WOODSON.
CHAS. B. POYNTZ."

To the reading of said report in evidence to the jury the defendant, by counsel, objected. The court overruled said objection; to which the defendant, by counsel. excepted.

Counsel for the Commonwealth thereupon offered in evidence an additional report of said railroad commission.

To the introduction in evidence of said additional report the defendant, by counsel, excepted.

By the COURT: There might be part of that that I would sustain an objection to, and part I would overrule. There are three classes of indictments against the defendant: One for extortion, one for discrimination, and long and short haul. Some of those are probably embraced in that report. I don't presume you offer as evidence any report in regard to extortion, which has been disposed of.

By Mr. SWEENY: No, sir; I only want to offer this report so far as it is applicable to this long and short haul.

21 To the ruling of the court in permitting any part of said report to be read in evidence to the jury the defendant, by counsel, excepted.

Counsel for the Commonwealth thereupon read from said report in evidence to the jury as follows:

"To the Marion circuit court and to the grand jury of said county and court:

The railroad commission of the State of Kentucky, by virtue of the authority vested in them by the laws of Kentucky and in compliance with their duties as such, in addition to the information, recommendation, or report heretofore filed in this court on a former day of this term, hereby tender and file in this honorable court further information, report, and recommendation to the present grand jury now in session, in addition and by way of amendment to their said original information, report, or recommendation heretofore filed herein, the following information, accusation, or recommendation to said grand jury and to this honorable court, to wit:

Said commission further charge and accuse the said railroad company of having violated section 820 of the Kentucky Statutes, and also section No. 218 of the present constitution of the State of Kentucky, by charging, collecting, demanding, or receiving a greater compensation in the aggregate for the transportation of property of like kind, under substantially similar circumstances and

22 conditions, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance. The said railroad commission having refused to exonerate or permit the said railroad company to charge more for said service as set out in the original accusation and recommendation filed on a former day of the present term in this

court for the violation upon the part of the Louisville & Nashville Railroad Company of sections of the statutes as herein set out, and for each and every offense and for the violation of said sections in and for the particular cases as herein enumerated, as shown by exhibit hereto attached and made part hereof, marked 'C.'

The said railroad commission by virtue of the authority vested in them under the laws of this Commonwealth file this additional and amended information and recommendation to their original accusation, information, and recommendation filed in this court heretofore, and recommend and request the grand jury of the Marion circuit court that they, the grand jury, indict the said railroad company for the violation of the law as herein and heretofore set out, to the end that the Louisville & Nashville Railroad Company may be prosecuted for said violations of the sections of the Kentucky statutes hereinbefore named, and to the end that the good laws of this Commonwealth may be upheld.

RAILROAD COMMISSION OF KENTUCKY,
By C. C. McCHORD, *Chm.*,
UREY WOODSON,
CHAS. B. POYNTZ,
Railroad Commissioners."

To the reading in evidence to the jury of said report the
23 defendant, by counsel, objected. The court overruled said objection; to which the defendant, by counsel, excepted.

Counsel for the Commonwealth thereupon read in evidence to the jury from said Exhibit "C" as follows, to wit:

"October 2nd, 1894, from J. M. Shreve, one car-load of coal from Pittsburgh, Ky., to Lebanon, Ky.; rate, $1.55 per ton.

October 4th, 1894, to same party, from Altamont, Ky., to Lebanon, Ky.; rate, $1.55 per ton.

October 17th, 1894, to same party from same point to same point, same rate."

Counsel for the Commonwealth announced that he read from Exhibit C those portions referring to Oct. 2nd and to Oct. 4th only for the purpose of identifying the party, the points of shipment, and rate referred to under date of Oct. 17th, 1894.

To the reading in evidence to the jury of said extracts from Exhibit C counsel for defendant objected. The court overruled said objection; to which the defendant, by counsel, excepted.

J. M. SHREVE, called for the Commonwealth, being duly sworn, testified as follows:

Direct examination by Judge RIVES:

Q. What business are you engaged in?
A. I am engaged in the coal and implement business here.
Q. In Lebanon?
A. Yes, sir.
24 Q. How long have you been so engaged here?

A. Well, I guess, fourteen or fifteen years.

Q. Previous to that time, in what business were you engaged and where?

A. I was engaged in the coal business at Livingston, Ky.

Q. Did you, on the 17th day of October, 1894, receive a car-load of coal from Altamont, Ky., here at Lebanon?

A. Yes, sir.

Question and answer objected to as admitted and not necessary to be proven. The court overruled said objection; to which the defendant, by counsel, excepted.

Q. Now I will finish the question as I tried to put it. Did you, on the 17th day of October, 1894, receive, here at Lebanon, a car-load of coal, shipped from Altamont, Ky., over the Knoxville division of the Louisville & Nashville railroad to Lebanon, to you; and if so, what amount of coal was in the car, and what rate per ton did you pay on it as freight, and what was the aggregate amount of freight paid by you on the car?

Objected to by counsel for defendant because it is admitted by a written agreement. The court overruled said objection; to which the defendant, by counsel, excepted.

A. Well, the amount was 37,600 pounds. I paid at the rate of $1.55, amounting to $29.14.

Q. $1.55 per ton, did you mean?

A. $1.55 per ton.

Q. Did you receive the coal here at Lebanon?

A. Yes, sir.

Q. Over the Knoxville division of the Louisville & Nashville railroad?

25 A. Yes, sir.

Q. How does the line from Altamont, Ky., to Louisville, Ky., and from Altamont, Ky., to Elizabethtown, Ky., run with reference to Lebanon?

A. Well, they run through Lebanon.

Q. Do you know the distance from Altamont, Ky., to Lebanon, Ky., on that road?

A. No; I do not.

Q. About the distance?

A. Well, I suppose it is 80 miles; maybe 82 or 83 miles.

Q. Do you know the distance from Lebanon to Louisville, on the same line of road?

A. I think it is 68 miles, maybe, from here to Louisville.

Q. Is there any other line of railroad in operation from Altamont, Ky., to Lebanon, Ky., or any other line in operation from Altamont, Ky., to Louisville, Ky., or Elizabethtown, Ky., besides the Knoxville division of the Louisville & Nashville railroad?

A. Well, I don't know that there is. At Livingston there is a branch road; I don't know how it does run—where.

Q. Do you know how the coal that is shipped from Altamont to

Louisville, by way of the Louisville & Nashville railroad, comes, with reference to Lebanon?

A. Well, it comes through here, I think.

Q. Do you know how the coal that is mined and shipped from Altamont is loaded on the cars?

A. How it is loaded?

Q. Yes, sir; and by whom.

26 Objected to by counsel for defendant. Objection overruled; to which the defendant, by counsel, excepted.

A. How it is loaded on the cars? It is loaded from bank cars over the tipple—it was when I was there—into the gondolas.

Q. By whom was it loaded?

A. Well, this car of coal that you have reference to I think the Altamont Coal Co. I got this car from them at the time they were running there at Altamont. It was loaded there.

Q. In any case of coal shipped from Altamont, from any of the mines in operation there, state whether the railroad company does the loading or whether the mine operators do the loading.

Objected to by counsel for defendant. Objection overruled; to which the defendant, by counsel, excepted.

A. The operators do their loading.

Q. Who unloaded the car that you got on the 17th of October, 1894?

A. I had it unloaded.

Q. Do you know what the rule of the Louisville & Nashville Railroad Co. to the consignees of coal along its line is in regard to whether the company shall unload the coal or the consignees?

A. Well, I don't, only here at this place. We always unload the coal that we receive here.

Q. State whether or not any particular time is limited for that unloading of the coal.

27 A. Yes, sir; I believe it is 48 hours, is the limit.

Q. What kind of cars are used for the shipment of all the coal that comes through Lebanon from Altamont?

A. Well, the most of the coal is shipped in flat cars, gondolas, but I see coal passing even in box cars sometimes.

Q. Was this of yours in a gondola or box car?

A. Gondola.

Q. State whether there is any difference in those gondola cars save in the capacity or amount that may be shipped at one time on them.

A. Difference in the amount put on?

Q. Yes, sir.

A. Oh, yes; some of them will carry 30 tons. They run, I think, from about 18 to about 30 tons, the gondolas that we have on this road.

Q. Is that the only difference in the gondola cars in use on this road?

A. In size? Well, I don't know that there are any that run higher than 30 tons. There may be some even smaller than 18 tons, but I have not seen any.

Q. You have not caught the question. I admit that there is a difference in the size or capacity. My question is: Is there any other difference in the construction of the cars or kind of cars among the gondolas?

A. Well, some of them are made with a drop to unload from the bottom, but most of them you have to shovel it over.

28 Q. State whether or not there is any difference in the rate per ton on coal that you may get, whether it is shipped in a car of small capacity or one of larger capacity.

A. No; the freight per ton is the same.

Q. State whether or not the same kind of engines and crews handle the coal that stops at Lebanon and that which goes on through Lebanon from the mountains.

A. Yes, sir; they go through here. My coal usually comes on the local trains, and they unload and go on with the other freight then, beyond here.

Q. State whether or not the same number of officials and the crew of the through trains are on local trains also—that is, engineer, fireman, brakemen; and conductor.

A. Oh, yes.

Q. State whether or not the Louisville & Nashville railroad was operating this Knoxville division road as a common carrier for a number of years.

Objected to by counsel for defendant because the best evidence of that fact is the charter. The court overruled the objection, to which the defendant, by counsel, excepted.

A. Yes, sir; they have been for a number of years.

Q. State whether or not all the freight receipts and other official papers issued to shippers and consignees here by it operating this road as a common carrier have been at all times since the construction of the road and up to the present time in the name of the Louisville & Nashville Railroad Co.

29 A. Yes, sir; since I have been here.

Q. State whether or not the Louisville and Nashville Railroad Co. has its regular depot agent here at Lebanon; if so, what is his name?

A. Well, Mr. Frank Harris is agent here now at present.

Q. State whether or not he was the agent of the Louisville and Nashville Railroad Co. here at Lebanon at the time of this shipment of coal, on October 17th, 1894.

A. No, sir; I think Mr. Anthony was here at that time. That is my recollection. That was before Mr. Harris came, I think.

Cross-examination by Mr. McCHORD:

Q. Elizabethtown is not on the Knoxville branch of the Louisville & Nashville railroad, is it?

A. That is on the main stem, I think.

Q. The line of railroad from Altamont passes through Lebanon and on to Louisville; Elizabethtown is not on that line?
A. No; it is not on this line. It is on the main line.
Q. You don't pass it in going from Altamont to Louisville through Lebanon?
A. No, sir.
Q. Elizabethtown is on the main stem of the Louisville and Nashville railroad?
A. The main stem; yes, sir.
Q. The line through Lebanon and on to Altamont branches from the main stem at Lebanon Junction?
30 A. That is right.
Q. How far is it from Lebanon Junction to Elizabethtown?
A. I don't really know the distance.
Q. Give your best judgment. Fifteen or twenty miles?
A. Yes, sir; I would think it was at least twenty miles.

Redirect examination by Judge RIVES:

Q. The road from the junction down to Elizabethtown is operated by the same company that operates this part of their road from Altamont through Lebanon and on to Elizabethtown?
A. Yes, sir.
Q. To whom did you pay that $29.14 freight on that car-load of coal?
A. Well, it was to whoever was agent at the time. Very often I pay the clerks that are in there.
Q. The agent of whom?
A. Of the L. & N.
Q. Railroad Company?
A. Yes, sir.
Q. State why you paid them that amount, $29.14, at the rate of $1.55 per ton.
A. That was the amount of the charges.
Q. That was the amount demanded by them?
A. Yes, sir.
Q. You paid it here at Lebanon, I believe you said?
A. Yes, sir.

31 Counsel for the Commonwealth thereupon read in evidence to the jury a written agreement between the parties hereto. Said agreement is in words and figures as follows, to wit:

Marion Circuit Court.

COMMONWEALTH OF KENTUCKY
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Agreement as to No. 505 Only.

It is agreed for the purposes of the trial of this case only, subject to exceptions for relevancy and competency, that on the 17th day

of October, 1894, the defendant, The Louisville & Nashville Railroad Company, on the Knoxville division of the said Louisville & Nashville railroad, did transport a car-load of coal from Altamont, Ky., to Lebanon, Ky., for J. M. Shreve, and similar coal by the car-load in similar gondolas——

By Mr. McCHORD: We object to that part of the agreement with reference to the rate of transportation from Altamont to Elizabethtown as incompetent.

The court overruled said objection; to which the defendant, by counsel, excepted.

By Mr. McCHORD: Now, your honor, we object to that part of it with reference to transportation to Louisville as incompetent.

The court overruled said objection; to which the defendant, by counsel, excepted.

—did transport a car-load of coal from Altamont, Ky., to Lebanon, Ky., for J. M. Shreve, and similar coal by the car-load, in similar gondolas or coal cars, similarly loaded from Altamont,
32 Ky., to Louisville, Ky., and to Elizabethtown, Ky., over the same line of road, and a longer distance and in the same direction, the distance from Altamont to Lebanon being shorter and included in the longer distance from Altamont to Louisville and to Elizabethtown, Ky., and did for said transportation services charge and receive the following rates, to wit: From Altamont, Ky., to Louisville, Ky., $1.00 per ton, and to Elizabethtown, Ky., $1.30 per ton, and from J. M. Shreve, at Lebanon, Ky., $1.55 per ton on said date.

(Signed) W. H. SWEENY,
Attorney for the Commonwealth.
THE LOUISVILLE & NASHVILLE RAILROAD CO.,
By W. C. McCHORD, *Att'y.*

By the COURT: It would be proper for the court to instruct the jury that this is an agreed statement of facts on the part of the parties.

C. C. McCHORD, called for the Commonwealth, being duly sworn, testified as follows:

Direct examination by Judge RIVES:

Q. I believe you were chairman of the railroad commission of Kentucky in the year 1894 and at the time this report was made to the Marion circuit court?

A. Yes, sir; I was chairman of the commission and member of the commission from 1891 up to December, 1895, or probably November, 1895. I resigned as commissioner in November, 1895.

Q. State whether or not all of the incorporated railroad companies of the State were required to report to the railroad commission, and whether or not the Louisville & Nashville Railroad Co. did,
33 in accordance with that requirement, make reports to the railroad commission.

Objected to by counsel for defendant.

By the COURT: I don't know about the competency of that. That is trying to prove what the law is.

By Mr. SWEENY: The object of the question is to prove that they were operating the road at this time as the Louisville & Nashville Railroad Co., and operating it as common carriers.

The court thereupon overruled the objection; to which the defendant, by counsel, excepted.

A. The Louisville and Nashville Railroad Co., like all the balance of the railroads in the State, made annual reports to the railroad commission during the time I was a member of the commission as to their earnings; they also made reports as to their property to the auditor of this State, and the auditor would turn those reports over to the railroad commission, and that shows its property for taxation. They also made any other reports that the railroad commission asked of them.

Q. State what company was in 1894 operating the line of road from Altamont, Ky., through Lebanon, Ky., to Louisville, Ky., and to Elizabethtown, Ky.

A. The Louisville & Nashville Railroad Company.

Q. State whether or not they were operating that as a common carrier.

A. They were.

34 Q. State whether or not you know what the universal custom or rule was as to the loading and unloading of coal, where it was shipped by the car-load over the Knoxville division of the Louisville & Nashville Railroad Co. Whether it was loaded or unloaded by the railroad company or loaded by the mine operators and unloaded by the consignees.

Objected to by counsel for defendant. Objection overruled; to which the defendant, by counsel, excepted.

A. I have no personal knowledge on that, only information obtained as railroad commissioner from the parties on this investigation. I never saw them, that I recollect, either unloading or loading a car-load of coal on the Knoxville branch. I can only state from the information I gathered as an official.

By the COURT: I don't think that would be proper.

Q. Have you got it from officers of the Louisville & Nashville Railroad Co.?

Objected to by counsel for the defendant.

By the COURT: I don't think that would be competent. I will sustain the objection to his making that further statement. He can state that he did not have any personal information, only information received through certain sources. For him to go on and state what that information was, I think would be incompetent. I will sustain the objection.

To the ruling of the court the Commonwealth, by counsel, excepted.

Counsel for defendant declined to cross-examine.

35 Counsel for the Commonwealth thereupon offered in evidence a part of the commissioners' report not heretofore offered.

Counsel for defendant objected to the introduction in evidence of said report. The court overruled said objection; to which the defendant, by counsel, excepted.

Said report is in words and figures, to wit, as it was thereupon read to the jury in evidence:

"To the Marion circuit court:

The railroad commission of the State of Kentucky, under and by virtue and by direction of the statutes made in such cases provided, hereby files information against the Louisville & Nashville Railroad Company, and charges said Louisville and Nashville Railroad Company with charging, collecting, and receiving a greater compensation in the aggregate for the transportation of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance; that for more than twelve months last past the said Louisville & Nashville Railroad Company, upon all shipments of coal from Altamont, Ky., to Lebanon, Kentucky, charged a greater compensation in the aggregate than said company charged, collected, and received for the shipment of a like commodity from said points to Louisville, Kentucky. The rates so charged, collected, and received to Lebanon, Kentucky, from said points, per ton, were as follows: from

36 Altamont, $1.55, while upon similar shipments from said points to Louisville, Kentucky, a greater distance over the same line in the same direction, the rate charged, collected, and received by said company during the whole of said time did not at any time exceed $1.10 per ton from any of said stations.

Said commission further states that heretofore, to wit, on the — day of ——, 1894, the Commercial Club of Lebanon, Kentucky, filed written complaint with this board, charging said railroad company with the offense as hereinbefore stated; that pursuant to its duty this commission did investigate said charges and found them to be true; that before said investigation was made said Louisville and Nashville Railroad Company was duly notified, and a meeting was held at Lebanon, Kentucky, and also at Louisville, Kentucky, at which testimony offered by said complainant and by said railroad company of witnesses was reduced to writing, and after a full investigation of said charges and consideration of all the evidence offered said commission, on the — day of ——, 1894, made and entered the order, a copy of which is hereto attached, marked 'A.'

A list of the names of the shippers and witnesses to said acts and charged upon the part of said Louisville and Nashville Railroad Company is hereto attached, marked 'B.'

Said commission further states that the distance from Lebanon to Louisville, Kentucky, is 67 miles greater than from Lebanon,

Kentucky, to any of the aforesaid points; that said illegal
37 acts on the part of said Louisville and Nashville Railroad Company are continuing, and said company at this time charges, collects, and receives the rates aforesaid upon all shipments of coal to said points.

In obedience to the requirements of the law, this information is filed with the Marion circuit court for such action as may be required by the statutes of the State, and this commission respectfully recommends that said Louisville and Nashville Railroad Company be prosecuted by an indictment or by action in the name of the Commonwealth for the recovery of the penalties imposed by the Kentucky statutes for violation of its provision as hereinbefore stated.

January 26, 1895.

RAILROAD COMMISSION OF KY.,
By C. C. McCHORD, *Chairman*,
UREY WOODSON, *Commissioners*."

The Commonwealth thereupon rested.

The defendant thereupon moved the court to peremptorily instruct the jury to find a verdict of not guilty; to which motion the Commonwealth, by counsel, objected. The court sustained said objection and overruled said motion; to which action of the court the defendant, by counsel, excepted.

38 The defendants then offered in evidence to the jury the following acts of the General Assembly of the Commonwealth of Kentucky, to wit:

An act to charter the Louisville and Nashville Railroad Company, approved March 5th, 1850, found in the Acts of 1849, 1850, pages 427 to 437, inclusive.

An act to charter the Lexington & Frankfort Railroad Company, approved February 28th, 1848, found in the Laws of Kentucky for 1847–'8, pages 34 to 47, inclusive.

An act to amend the charter of the Lexington & Frankfort Railroad Company, approved February 26th, 1849, found in the Acts of 1848–'9, page 23.

An act entitled An act to amend an act entitled An act to charter the Louisville and Nashville Railroad Company, approved March 20th, 1851, found in volume 2, Acts of 1850–'1, pages 442 to 445, inclusive.

Counsel for the Commonwealth objected to the introduction of the above acts because they are not all of the amendments to the charter of the Louisville & Nashville Railroad Company, and the court thereupon ruled that all the amendatory acts were admissible in evidence.

All of said acts are here referred to as a part of this record.

It is further agreed between counsel for the parties that the defendant accepted said charter of March, 1850, and organized under the same; and it is further agreed that the action, if any, of
39 said defendant with reference to each amendment to said charter thereafter passed is as follows:

Amendment 1. An act to amend an act entitled An act to charter the Louisville & Nashville Railroad Company, approved March 5th, 1850. Approved March 20, 1851.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 2. An act to amend an act to charter the Louisville & Nashville Railroad Company, approved March 5th, 1850. Approved December 15, 1851.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 3. An act to amend an act entitled An act to charter the Louisville and Nashville Railroad Company, approved March 5, 1850, and the act amending same, approved March 20, 1851. Approved January 9, 1852.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 4. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 24, 1854.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

40 Amendment 5. An act for the benefit of the Louisville & Nashville Railroad Company. Approved March 7th, 1854.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 6. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved January 17th, 1856.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 7. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved February 6th, 1858.

Accepted by the company March 26th, 1858.

Amendment 8. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved February 28th, 1860.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

41 Amendment 9. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved May 16th, 1861.

Accepted, as required by section 2 of the act, by the stockholders of the company on October 7th, 1861.

Amendment 10. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 26th, 1863.

This amendment was applied for by the company, has been acted

on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 11. An act to amend the charter of the Louisville & Nashville Railroad Company. Approved January 8th, 1864.

Accepted, as required by section 1 of the act, by the stockholders of the company at the annual meeting held on October 3rd, 1864.

Amendment 12. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 10th, 1864.

Accepted by the stockholders of the company at the annual meeting held on October 3rd, 1864.

42 Amendment 13. An act for the benefit of the Louisville and Nashville Railroad Company. Approved March 2nd, 1865.

This amendment was applied for by the company, was acted upon, and the company did not consider a formal acceptance necessary.

Amendment 14. An act to amend the charter of the Louisville and Nashville Railroad Company, approved March 5th, 1850. Approved February 21st, 1868.

Accepted, as required by sec. 1 of the act, by the stockholders of the company at a meeting held on March 31st, 1868.

Amendment 15. An act to authorize the Louisville & Nashville Railroad Company to extend its Bardstown branch. Approved March 10, 1869.

Can find no record of its acceptance.

Amendment 16. An act to amend the charter of the Louisville and Nashville railroad. Approved March 21st, 1870.

Can find no record of its acceptance.

Amendment 17. An act to amend the charter of the Louisville & Nashville railroad. Approved March 15th, 1871.

This amendment was accepted October 4, 1871, and May 15, 1872; was repealed by act approved February 9th, 1876, at the instance of the company.

43 Amendment 18. An act to authorize the counties of Madison, Estill, Lee, Owsley, the city of Louisville, and any other cities, counties, or towns in this State, corporations, or individuals to subscribe for stock in a branch of the Louisville & Nashville railroad from Richmond to Irvine and Scotts Landing or Beattyville, in Kentucky. Approved March 16th, 1871.

Can find no record of its acceptance.

Amendment 19. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 1st, 1872.

Applied for without authority from the company and rejected by the stockholders May 15th, 1872.

Amendment 20. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved March 19th, 1872.

Accepted by the stockholders of the company October 1st, 1873.

Amendment 21. An act to amend the charter of the Louis-

ville and Nashville Railroad Company and to increase the directors thereof to eleven. Approved February 9th, 1876.

Accepted by the stockholders of the company October 4th, 1876.

44 Amendment 22. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved March 9th, 1876.

Accepted by the stockholders of the company October 4th, 1876.

Amendment 23. An act to amend the charter of the Louisville and Nashville railroad. Approved March 18th, 1876.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 24. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved March 6th, 1878.

Accepted by the stockholders of the company October 2nd, 1878.

Amendment 25. An act amending the charter of the Louisville and Nashville Railroad Company. Approved January 27th, 1880.

Accepted by the stockholders of the company March 26th, 1880.

Amendment 26. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved February 27th, 1880.

Accepted by the stockholders of the company March 26,
45 1880.

Amendment 27. An act to authorize the Louisville chancery court to appoint the Louisville & Nashville Railroad Company receiver of a certain trust fund. Approved January 28th, 1882.

Applied for and acted upon by the company.

Amendment 28. An act to amend the charter of the Louisville and Nashville Railroad Company. Approved April 7th, 1882.

This amendment was applied for by the company, has been acted on ever since it was granted, and the company did not consider a formal acceptance necessary.

Amendment 29. An act to amend the charter of the Louisville & Nashville Railroad Company, approved March 5th, 1850. Approved April 29, 1890.

Accepted by the stockholders of the company July 6th, 1891.

46 S. R. KNOTT, called for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. State your residence and occupation.

A. I reside at Louisville, Kentucky; am vice-president of the Louisville & Nashville Railroad Co.

2 Q. State the duties of that position, and the extent of your experience and familiarity with railroad rates and rate-making on the Louisville & Nashville railroad and other railroads.

A. Among the duties connected with that position is the supervision of the freight and passenger business of the company. I have been connected with railroads for more than twenty years. During the last fifteen or sixteen years I have been more or less di-

rectly connected with the making of rates on freight carried by the Louisville & Nashville railroad. During that time I have been in the general freight office as clerk, chief clerk to the traffic manager, assistant to the president, traffic manager of the company. For the past ten years or more I have been closely and directly, almost exclusively, connected with the supervision of the rates charged for the transportation of freight and passengers over the Louisville and Nashville Railroad lines.

3 Q. State the relative positions of Altamont, Lebanon, Louisville, and Elizabethtown with reference to the line of the Louisville and Nashville railroad.

47 A. Altamont is a coal-shipping station on what is known as the Knoxville division of the Louisville and Nashville railroad. This division diverges from the main stem of the Louisville and Nashville railroad at Lebanon Junction, Kentucky, at a point about 30 miles south of Louisville, and runs southeastwardly through Lebanon, Altamont, Pittsburg, &c., to the Kentucky and Tennessee State line at Jellico. Lebanon is 67 miles southeast from Louisville. Altamont is 84 miles beyond Lebanon, and 151 miles from Louisville. Elizabethtown, Kentucky, is a point on the main stem of the Louisville & Nashville railroad, 12 miles south of Lebanon Junction and 42 miles south of Louisville. It is a junction point between the Illinois Central railroad and the Louisville & Nashville railroad.

4 Q. State fully the circumstances and conditions other than those, if any, relating to cost of service, under which coal was, in October, 1894, and is now, transported from Altamont to Lebanon and Louisville respectively. State the effects in 1894 and now of the transportation of coal at less rates from said point to Louisville than from said point to Lebanon upon all persons and places interested, and especially whether any community, person, or interest then was or could have been or now is or can be injured thereby, and state what would have been the effect then and would be the effect now if the railroad company had been then and were now re-

48 quired to charge no more on coal to Lebanon than it charges to Louisville.

Objected to by counsel for the Commonwealth.

Counsel for defendant resisted said objection and claimed that the question was proper, and that the facts which would be disclosed by the answer thereto would be relevant and competent under a proper construction of section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes.

Counsel for defendant further stated that the defendant claimed, under section 1 of article 14 of the amendments to the Constitution of the United States, prohibiting any State to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, the right under the circumstances which would be disclosed by said answer to transport coal from Altamont and other coal-shipping points to Lebanon at the rate of $1.55 per ton, or other just and proper rate,

and at the same time to transport coal from Altamont and other coal-shipping points to Louisville at a less rate.

That section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, if so constructed as to prevent said practice under the circumstances which would be disclosed in the answer to said question, would have the effect, arbitrarily and without any justification or excuse, of compelling the defendant to give up such transportation of coal to Louisville and the revenue accruing to it therefrom, or of requiring the defendant, arbitrarily and without any justification or excuse, to reduce ma-
49 terially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points without any inquiry, judicial or otherwise, to ascertain whether said last-named rates were unjust or unreasonable, and when in fact reasonable, and that therefore said constitutional and statutory provisions of the State of Kentucky so construed are unconstitutional and void because in conflict with the aforesaid provisions of the Constitution of the United States.

The defendant, by counsel, further contended that by reason of the contract existing between it and the Commonwealth of Kentucky, resulting from the acceptance by it of the charter granted to it by the Commonwealth of Kentucky, it had the right to engage in the transportation of traffic and to receive revenue therefor, of which right the Commonwealth of Kentucky could not deprive it; that if the character of traffic to be accepted by it or the rates to be accepted for such traffic could be subject to regulation at all by said Commonwealth of Kentucky it could only be a just and reasonable regulation, having for its objects the promotion of the public welfare, and that any arbitrary regulation, either requiring the defendant without any justification or excuse to give up entirely the transportation of coal from Altamont and other coal-shipping points to Louisville or of requiring it, arbitrarily and without justification or excuse, to reduce materially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points with-
50 out any inquiry, judicial or otherwise, as to whether said last-named rates are unjust or unreasonable, and when in fact they are reasonable, would be an impairment of the obligation of said contract, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, prohibiting any State to pass any law impairing the obligation of contracts; and counsel for the defendant stated that the defendant relied upon the right and immunity guaranteed to it by said subsection 1 of section 10 of article 1 of the Constitution of the United States, and that the facts which would be disclosed by the answer to said question would show that section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, if construed so as to exclude from consideration the facts which would be disclosed by said answer, would impair the obligation of said charter contract as above stated.

The court, however, decided each and all of said contentions

against the defendant, and sustained the objection of the plaintiff to the question, and refused to allow said question to be answered; to which decision and ruling of the court and to each and every part thereof the defendant, by counsel, at the time excepted and still excepts.

And thereupon counsel for defendant avowed that the witness if allowed to answer said question would answer truly as follows:

That coal was in 1894 and is now transported from Alta-
51 mont and a similar coal-shipping stations, such as Pittsburg, Ky., Grays, Ky., &c., to Lebanon, Ky., to be used there for steam and domestic purposes, at rates related to the rates charged for the transportation of coal from the same points of shipment for the same purposes to other points in Kentucky similarly situated. These rates I believe to be fair and reasonable. They have been in effect for a number of years, and have admitted and do admit of the use of both steam and domestic coal coming from those points and delivered at Lebanon at prices which are not excessive, and which prices have, from time to time, been lowered since the mines were first opened in the Altamont and Jellico district. They are made with relation to the other rates of freight carried on the Knoxville branch to Lebanon and other points similarly located. They are made having in view the competition of coal with other fuel, such as wood, which is available at Lebanon for both domestic and steam purposes.

The rates to Lebanon are also effected by the competition of coal coming from Louisville, which is a large and important distributing market for coal brought there by water or rail, and which coal of high quality can be shipped from Louisville to Lebanon, and so in fact was shipped until by the opening of the mines in Altamont and Pittsburg district it was found that coal of good quality and at the rates charged from Altamont or Pittsburg to Lebanon could be delivered at Lebanon at lower prices than coal shipped
52 from Louisville to Lebanon. Lebanon is not situated on a navigable stream, and before the extension of the Knoxville division into the coal-fields in the vicinity of Altamont and Pittsburg it depended for such coal as it used upon coal brought into Louisville from mines in Pennsylvania and West Virginia, by barges down the Ohio river, at an extremely low cost of transportation and sold in Louisville at prices relatively low, and shipped from that point to Lebanon. Of necessity, therefore, the consumers of coal at Lebanon were then paying more for coal than the consumers at Louisville by at least the rates on coal from Louisville to Lebanon. When the Knoxville division was completed beyond Lebanon to the coal-fields, then Lebanon had an additional source of supply, being enabled to obtain coal from mines in that field as they were opened, and they paid for the transportation of same to Lebanon the rates then fixed by the Louisville & Nashville road, which were in the beginning higher than the rates charged in 1894 or than the rates which are now charged.

Coal from these mines on the Knoxville division, if brought into Louisville, has to be sold there for prices obtainable in competition

with coal reaching Louisville by rail or water transportation from other points.

The controlling condition fixing the price that the Kentucky coal miners can secure for coal in Louisville is the price of coal mined in Pennsylvania or West Virginia and brought to Louisville down the Ohio river.

For quite a number of years after the Knoxville division
53 was extended into the southeastern Kentucky coal-fields Louisville continued to get practically all of its coal from Pennsylvania and West Virginia, via the Ohio river, at very much lower prices than Lebanon had to pay, because Louisville enjoyed the advantage of being upon a waterway affording the cheapest known means of transportation.

As the development of the coal-mining industry along the Knoxville division continued, it was found that in producing coal for the interior towns, such as Lebanon, certain grades of coal were produced which could not be readily placed or disposed of in such local markets, the demand in those markets not being sufficiently steady or sufficient in amount to consume the regular output of the mines. The result of this was that the mines were hampered and restricted in their operations and the cost of the production of the coal for sale at the local markets, such as Lebanon, was increased over what it would otherwise have been.

Finding these conditions to exist, the Louisville & Nashville Company arranged to transport coal from those mines to Louisville at rates which would enable this coal to be sold in Louisville in competition with coal reaching Louisville by river. The railroad company found it was able to transport this coal at a low rate, because whatever traf-ic was thus secured was new or additional traf-ic, imposing little additional expense upon the company, and the revenue thus derived, although at a small rate per ton, exceeding the additional expense immediately connected with its handling,
54 provided a part of the income necessary for the continued operation of the road, which would otherwise have had to be provided by the local traf-ic, such as the transportation of coal from Altamont or Pittsburg to Lebanon.

It was under these circumstances and in pursuance of this arrangement that the rate on coal from the above-named points to Louisville in 1894 was then less and is now less than the rate on coal from the same points to Lebanon.

The effect of this arrangement during the year 1894 and before and afterwards was highly beneficial to all persons connected with the mines, either directly in the way of miners or mine operators or indirectly in the way of producers of the supplies consumed by those connected with the mines. It gave the mines a market where they could place their surplus output instead of letting it go to waste, or instead of shutting down the mines until the local market could consume that surplus output.

The mine operators did not receive for the coal so placed on the Louisville market as high price per ton as they received from the consumers at Lebanon and other local points, but since the business

was new or additional business to them, which did not proportionately or materially increase the expenses of the mines, and frequently did not increase those expenses at all. the surplus coal could be and was sold on the Louisville market for a very low price.

This was indirectly highly advantageous to the mine operators and everybody else connected in any way with the mines
55 or interested in their prosperity, giving the miners much steadier employment, while materially reducing the cost per ton of mining the coal.

By reason of this reduction in the price per ton of mining coal a very marked reduction resulted in the price of coal to consumers at Lebanon and other local points.

While prior to this arrangement those consumers paid in the beginning two dollars per ton for lump coal at the mines, they were able in 1894 to get the same coal at a dollar per ton, which reduction was largely, if not wholly, due to the fact that the miners could place their surplus output on the Louisville market.

The effect upon Lebanon and other local points, therefore, was decidedly beneficial. The Louisville & Nashville Railroad Company was benefitted because it obtained with but very little additional expense an additional traf-ic, paying, it is true, only a small revenue per ton, but a revenue believed to be in excess of the extra cost of handling it, and thereby enabling the company to get a fuller use out of its railroad and equipment than it would otherwise have been able to do. This was done without any increase in rates at Lebanon or other intermediate point. but, on the contrary, because of the income from this new source the railroad was and is enabled to carry coal and other freights to Lebanon and other points at lower rates than it could otherwise charge.

As to Louisville. so far as this arrangement had any effect at all, it was beneficial in giving the consumers the choice of varie-
56 ties of coal which they had not theretofore enjoyed, and possibly at times standing in the way of temporary combinations of dealers in river coals to increase the price of coal to Louisville consumers. Generally speaking, Louisville got its coal at the same price for which it obtained it before, for no attempt was made by the Kentucky coal operators to cut under the usual prices made by the handlers of Pennsylvania and West Virginia coal.

No community, person, or interest was or could have been injured by this arrangement. The consumers of coal, neither at Lebanon nor at any other local point, were in any degree prejudiced by the arrangement, because thereby Louisville consumers did not get any advantage over them which they did not enjoy independently of the arrangement and which they had not enjoyed long prior to the arrangement. The price of transportation of coal to Lebanon was not increased at all by reason of the lower rate to Louisville. Lebanon still got the same rate as or a lower rate than it would have gotten, and it was at no greater disadvantage with respect to Louisville than it was before the arrangement was made. Indeed, by

virtue of the arrangement, it got, in the reduced price of coal per ton at the mines and the lowered rate, a substantial benefit.

If the railroad company had been required to charge no more on coal from Pittsburg, Grays, and Altamont to Lebanon and other local points than it charged on coal from the same points of
57 shipment to Louisville, it would have been compelled to do one of two things: First, to give up the coal traffic from those points of shipment to Louisville in which it had in the past participated and from which it had derived a revenue, as I have already explained, without in any wise injuring any of the intermediate points or any other community or person, or, second, it would have been required to reduce all of its rates on coal from those points of shipment to all intermediate points to the low rate from those points of shipment to Louisville, notwithstanding the fact that those intermediate rates are only just and reasonable rates for the transportation service performed. Such reduction would thus have been ordered without any investigation or inquiry, judicial or otherwise, to establish their unreasonableness or injustice. Either of the courses mentioned would have entailed serious loss upon the Louisville & Nashville Railroad Co. If forced to choose between them the company doubtless would have given up the coal business to Louisville with the revenue derived from that business, and to stand the loss thereby inflicted, rather than to stand the losses resulting from so material a reduction of all its intermediate rates. No person or community could have been benefited by any such result.

On the contrary, the mines and all those dependent upon the mines would have been undoubtedly injured, and the mines would have been relegated to the discouraging conditions prevailing prior to the adoption of the arrangement whereby southeastern Ken-
58 tucky coal could be placed in the Louisville market, and Lebanon and other intermediate points would also have been injured not only by the decrease in the demand at the mines for flour and other supplies furnished by them, but directly by an increased price which would no doubt have been placed upon the coal consumed by them.

In brief, the transportation of coal from the points above named to Louisville throughout 1894 was absolutely controlled by the competition on the Louisville market with the coal from Pennsylvania and West Virginia, brought to Louisville by river, and the mine operators had to reduce the price of their coal and the railroad company had to reduce the rate for its transportation very materially in order to get Kentucky coal into the Louisville market. The transportation to Lebanon was not controlled or affected by any such competition. The fact that the railroad company joined with the mine operators in recognizing and meeting the condition at Louisville was in no sense an injury to Lebanon. It neither gave to Louisville an advantage over Lebanon which it did not otherwise possess, nor did it increase the rate of transportation to Lebanon, but, on the contrary, it was decidedly beneficial to all interests affected by it; and if the arrangement had not been made, the result would

have been simply to cause a withdrawal from participation by the Kentucky coal-operators in the Louisville market and from sharing by the railroad company in the transportation of coal to that market without in any way benefitting Lebanon, but with strong
59 probabilities of injuring it in various ways, including an increased price of coal.

All the above facts were true not only in 1894, but have been true ever since and are true now.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objection to the question, and still claiming under and relying on said subsection 1 of section 10 of article 1 of the Constitution of the United States, and on said section 1 of the fourteenth amendment thereto, for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly, but the court still decided each and all of said contentions against the defendant, and refused to permit the witness to answer the question; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

5 Q. State generally the effects upon all persons and places involved of railroad companies making low rates to and from places at which controlling and unavoidable competition prevails without making correspondingly low rates at intermediate non-competitive points; are any of said communities, places, or interests prejudiced thereby; what would be the effect of requiring railroad companies to charge no more for the transportation of property of like kind for shorter than for longer distance in the same direction and including the shorter distance, in all instances except where the
60 actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying passengers and loading, moving, and unloading freight trains, is greater for the shorter than for the longer distance, and in addition state these various effects with reference to railroads in Kentucky, and particularly to the Louisville and Nashville railroad in Kentucky.

Objected to by counsel for the Commonwealth.

Counsel for defendant resisted said objection, and claimed that the question was proper, and that the facts which would be disclosed by the answer thereto would be relevant and competent under a proper construction of section 218 of the constitution of Kentucky and section 820, Kentucky Statutes.

Counsel for defendant further stated that the defendant claimed, under section 1 of article 14 of the amendments to the Constitution of the United States, prohibiting any State to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws, the right, under the circumstances which would be disclosed by said answer, to transport tra-fic at low rates to or from places at which controlling and unavoidable competition might prevail and might necessitate such rates without making rates as low to intermediate non-competitive

points, even though the actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying
61 passengers and loading, moving, and unloading freight trains, could not be shown to be greater for the shorter than for the longer distance; that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, if so construed as to prevent said practice under such circumstances would have the effect, arbitrarily and without any justification or excuse, of compelling the defendant to give up its competitive tra-fic and the revenue arising therefrom or of requiring the defendant, arbitrarily and without any justification or excuse, to reduce materially its rates on non-competitive tra-fic without any inquiry, judicial or otherwise, to ascertain whether such last-named rates were unjust or unreasonable, and that therefore said constitutional and statutory provisions of the State of Kentucky so construed are unconstitutional and void because thereby in conflict with the aforesaid provisions of the Constitution of the United States.

The defendant, by counsel, further contended that by reason of the contract existing between it and the Commonwealth of Kentucky, resulting from the acceptance by it of the charter granted to it by the Commonwealth of Kentucky, it had the right to engage in the transportation of traffic and to receive revenue therefor, of which right the Commonwealth of Kentucky could not deprive it; that if the character of traffic to be accepted by it or the rates to be accepted for such traffic could be subject to regulation at all by said Commonwealth of Kentucky, it could only be a just and
62 reasonable regulation, having for its object the promotion of the public welfare, and that any arbitrary regulation, either requiring the defendant, without any justification or excuse, to give up entirely said competitive traffic and the revenue arising therefrom or of requiring it, arbitrarily and without justification or excuse, to reduce materially its rates on said non-competitive traffic without inquiry, judicial or otherwise, as to whether said last-named rates are unjust or unreasonable, would be an impairment of the obligation of said contract, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, prohibiting any State to pass any law impairing the obligation of contracts.

And counsel for the defendant stated that the defendant relied upon the right and immunity guaranteed to it by said subsection 1 of section 10 of article 1 of the Constitution of the United States, and that the facts which would be disclosed by the answer to said question would show that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes, if construed so as to exclude from consideration the facts which would be disclosed by said answer, would impair the obligation of said charter contract, as above stated.

The court, however, decided each and all of said contentions against the defendant and sustained the objection of the plaintiff to the question and refused to allow said question to be answered; to which decision and ruling of the court and to every part thereof the defendant, by counsel, at the time excepted and still excepts.

And thereupon counsel for the defendant avowed that the witness, if allowed to answer said question, would answer truly as follows:

63 Primarily or as an original question, the Louisville & Nashville railroad does not, nor so far as my experience goes does any other railroad company, make a lower charge for the service to the longer-distance point than for carrying the same kinds of traffic to the intermediate or shorter distance point. This lower charge for the longer haul is only made where the circumstances and conditions under which the service to such longer-distance point is performed are substantially dissimilar from the circumstances and conditions under which the transportation service is performed to the intermediate-distance point.

When a locality is situated, for example, upon a navigable river, and by reason of that situation enjoys lower freight rates than other localities not so situated, a railroad company reaching there, in order to share in the traffic to and from that point influenced by the competition mentioned, must reduce its rates to approximate those already enjoyed by such locality. If the railroad company does not do so it cannot share in that traffic. As a rule, the railroad company can afford to and does meet this competition. It has to maintain its road and equipment and meet its just and lawful obligations in the shape of interest on bonds, taxes, etc., and the handling of this additional competitive traffic does not increase the gross expenses of the road proportionately with the increase in gross receipts. On the contrary, there is only a slight increase in expense incurred as related to the total expense necessary to be met, so

64 that a comparatively small revenue per ton for the competitive traffic makes such traffic profitable in the sense that the railroad company is better off to share in the traffic at that rate than not to share in it at all, and since that rate is absolutely fixed by controlling and unavoidable competition, it must meet that rate or not share in the traffic. If a similar adjustment of rates were applied to all the railroad company's traffic the result would be to deprive it of a source of revenue to which it is justly entitled under rates reasonably adjusted with which to pay the great bulk of the expenses of maintaining and operating a railroad.

With this explanation, the question may be readily answered, making the low rate to and from the point enjoying such controlling and unavoidable competition, without charging higher rates for shorter intermediate distances to or from non-competitive points, does not in anywise injure the non-competitive points. It does not place them at a disadvantage with respect to the competitive point. It simply recognizes the advantages of the competitive point, which would exist just the same, whether the railroad company recognized them or not.

Its effect upon the competitive point is calculated to be salutary, in that it affords a choice of routes which would not otherwise be enjoyed. Its effect upon the railroad company is to give it an additional traffic and an additional revenue, though a comparatively small revenue per ton.

Neither the competitive point nor the non-competitive point nor

any person or interest at either is in any degree prejudiced
65 by such an arrangement.

It is to the interest of the railroad company that the business at its local non-competitive points should be increased, and good judgment requires the railroads to foster and promote the business at such points, so far as it can be properly done.

In some sections of the country, where the railroads run through a territory already thickly settled, producing traf-ic important in amount, and in many cases handling a class of business that is competitive either in its production or distribution with business at other points, as, for instance, points on a navigable stream, lake, or ocean, the railroads can and do, with a view of promoting their local traf-ic, recognize such competitive conditions. They, in effect, say, "We do not wish to and could not if we would withdraw from the long-distance competitive point the advantages and facilities enjoyed by it, but, under the circumstances, will adjust our rates to the intermediate points with relation to those conditions."

Where, however, a railroad runs through a sparsely settled country, which country is furnished by the building and operation of such railroad with facilities of transportation not previously enjoyed, and with rates of freight very much lower than could in any other wise be secured, and upon the returns from which local traf-ic tributary to the line it is compelled to depend for the necessary revenue to operate and maintain its property, it does not and should not, under those conditions, reduce its rates on all traf-ic to
66 and from intermediate points to as low a figure as is charged the long-distance point under different conditions. It secures a revenue from its long-distance competitive business supplementary to its local revenue, and uses same as a benefit to the local communities along its line, in furnishing them improved and cheaper transportation than otherwise it would be able to offer.

If railroad companies were required to charge no more for the transportation of like kinds of freight for the shorter distance than for the longer distance, except where the actual cost of transportation (estimated, if such estimate were possible, with reference to the actual loading, moving, and unloading of the property) were greater for the shorter than for the longer distance, the result would be that only in the rarest instances, if at all, could the railroad company charge less for the longer than for the shorter distance. The cost of transportation of any particular commodity between two points is not susceptible of ascertainment, and only in very rare instances would such a state of facts exist as to make it possible to show with reasonable certainty the actual cost of transportation, loading, moving, and unloading of freight for a given longer distance to be less than the actual cost of loading, moving, and unloading such freight for the shorter distance, and even in such rare instances it would be utterly impossible to arrive at the amount of difference between the two costs.

I am aware of several instances where attempts have been
67 made to show that by reason of the greater amount of business on the long haul and the ability to handle it in large

quantities, the cost of its transportation was cheaper than the cost of the transportation for a short haul. In every such case with which I have been acquainted, it has been utterly impossible to state with any degree of precision the actual cost with respect to the transportation of a particular commodity, and the testimony has therefore been inconclusive and unavailing.

Reference to the cost "in the loading, moving, and unloading freight trains" in connection with rates on specific commodities or articles offered for transportation is misleading and improper. As I have said, efforts have been made to ascertain if possible whether or not there was a lower cost of expense in loading, moving, and unloading freight trains over the longer distance to competitive points, involving large traffic than on the same kinds of freight over shorter distances to points with a smaller traffic. Even these differences could not be ascertained with accuracy; but no effort has been made nor could be made to show the cost of handling one article out of the many thousand kinds of articles transported. This would have to be done in the event the rates on each kind of freight were to be adjusted with relation to the cost of handling.

Even where the entire business is involved at one point as compared with the entire business involved at another and shorter distance point, if it could be shown or assumed with reasonable fairness that the cost of handling was less to the longer-distance
68 point, such a difference is not used by the railroad managers as calling for or justifying a lower rate for the longer haul; for where the circumstances and conditions which effect rates are not dissimilar the railroads, properly and in the avoidance of unfair discrimination, continue to increase their rates as the haul increases, or as the actual service performed increases.

While an assumption or mere approximation may be made of the cost, so termed, of handling through freight trains as compared with local freight trains, not even such assumption or approximation has been made with regard to the cost of moving each particular ton of freight or each barrel or package of freight in such trains.

This so-called cost of handling or cost of loading, moving, and unloading freight trains, even if it were possible of ascertainment, would of necessity be variable, and would change from day to day, both to the local point and to the terminal point. Therefore, if it were used as a factor controlling the rates, it would require an adjustment of rates impossible to adapt to the business, as it might offer, and, moreover, in violation of the law, which does not permit of rates to be changed from day to day, or from point to point, without previous notice, and it would result in unjust discrimination as between shippers, or as between localities, or as between similar kinds of traffic.

If railroad agents in fixing their rates are limited in the
69 making of the lower rate to the longer-distance point to the cases where it can be demonstrated that the longer haul costs less than the shorter haul, it would be impossible to adjust rates to the shorter-distance point in any case higher than the longer-

distance point, and at the same time comply with the requirements of the law as to publishing rates and filing same in advance of the transportation, because the final cost, even assuming the impossible, namely, the ascertainment of such cost, cannot be ascertained or approximated before the service is performed, and therefore the rates could not be made subject to that restriction nor in accordance with that rule, and at the same time applied in accordance with the requirements of the law to the traffic actually moved. The result would be finally to require the railroads to haul all their business upon the basis of the low competitive rates or surrender the competitive traffic carried at such rates.

The result of any such requirement would be the arbitrary destruction of the competitive traffic in which the railroad companies now engage with profit to themselves and without any injury whatever to any other person or locality; or, on the other hand, an arbitrary and sweeping horizontal reduction of all non-competitive rates, regardless of whether they are reasonable rates or not, and without inquiry, judicial or otherwise, as to their reasonableness, when the traffic officials of the railroad companies believe them to be reasonable and the general public admits that most of them are reasonable in and of themselves.

70 It may be added that in the territory with which the Louisville and Nashville railroad is concerned, south of the Ohio and east of the Mississippi river, where the traffic is much less dense than in the northern and eastern parts of the country, the maintenance of local, non competitive rates, at a considerably higher figure than the low competitive rates, and the right to engage at the same time in the competitive business at those low rates, are essential to the prosperity of the railroad companies. They cannot in that territory be properly required to reduce their local non-competitive rates to the basis of the long-distance competitive rates, nor can they afford to give up the revenue from the competitive business.

The effects just stated are true with respect to railroads in Kentucky as in all other States south of the Ohio and east of the Mississippi river, and are true with respect to the Louisville and Nashville railroad in Kentucky.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objection to the question, and still claiming under and relying on said subsection 1 of section 10 of article 1 of the Constitution of the United States, and on said section 1 of the fourteenth amendment thereto, for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly; but the court still decided each and all of said contentions against the defendant and refused to permit the witness to answer the question; to which ruling

71 of the court and to each and every part thereof the defendant at the time excepted and still excepts.

6 Q. If the requirements mentioned in the last preceding question were enforced within the State of Kentucky upon transporta-

tion performed wholly in Kentucky, state whether or not that would in anywise affect or interfere with railroad traf-ic between points in Kentucky and points in other States, or railroad traf-ic between points in other States passing through Kentucky.

Objected to by counsel for the Commonwealth.

Whereupon counsel for the defendant contended that said question was proper, and that said objection should be overruled, because the facts disclosed by the answer to said question would show that if section 218 of the constitution of Kentucky, or section 820, Kentucky Statutes, was so construed as to exclude competition from consideration as a circumstance and condition within the meaning of that law, they would amount in the present case, and also in a great many other cases, to a regulation of commerce among the several States, contrary to subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with an act of the Congress of the United States of February 4th, 1887, entitled, An act to regulate commerce.

And counsel for defendant further stated that the defendant relied upon immunity from such interference in interstate traf-ic, to which it was entitled by reason of said provisions of the
72 Constitution and statutes of the United States.

But the court decided said contention and every part thereof against the defendant, and sustained the objection of the plaintiff to said question, and refused to allow the witness to answer said question; to which ruling of the court and each and every part thereof the defendant, by counsel, excepted at the time and still excepts.

And thereupon counsel for defendant avowed that the witness if allowed to answer said question would answer truly as follows:

The requirement mentioned by you as to the rates on the shorter-distance tra-fic as compared with the rates on the longer-distance tra-fic in Kentucky is radically different from and under different control or regulation from the construction of the similar provision authorized to be applied on tra-fic from points in Kentucky to points in other States or between points in other States passing through Kentucky, and the result would be in many instances to affect the rates on interstate tra-fic and materially interfere with its movement.

The rates on similar kinds of freight passing from different points, whether State or interstate, to a common point of destination are not made and should not be made arbitrarily—that is, ignoring the fact that similar conditions call for a similar adjustment of rates; and if the rule as referred to is applied, the railroad, in order to not violate the provisions of the law with respect to
73 discrimination between shippers or localities or similar kinds of tra-fic, would be in many cases required to withdraw entirely from the transportation of such interstate tra-fic.

To illustrate:

Jellico is the terminus of the Knoxville division of the Louisville and Nashville road at the Kentucky and Tennessee State line in

Whitley county. It is an important producing and shipping point for coal. There are a number of mines shipping coal from or near the station. Some of these mines are in Kentucky and some are in Tennessee. If the construction of the long and short haul law be made as suggested, under which the rates from Kentucky points to Lebanon shall not be higher than to Louisville, then we would invite the anomalous condition of rates by which coal from a common shipping territory coming from mines owned by the same companies or adjacent mines owned by different companies would have to be moved at different and varying rates to a common point or points of destination. This would seem to involve discrimination prohibited between same kinds of tra-fic under the same conditions, or would involve the restriction or impairment of interstate commerce, if the rates from the Tennessee mines were advanced to Louisville to not lower than to Lebanon in line with the rates from the adjacent Kentucky mines.

Or, with regard to the Kentucky mines north of Jellico, in the vicinity of Altamont or Pittsburg, there would be a
74 grave discrimination in saying to the mines in Tennessee in the Jellico district they might continue to ship coal to Louisville at rates competitive with the river coals, while mines in Kentucky would not be permitted to ship coal to Louisville at rates that would permit of competition.

Middlesboro, Kentucky, is also a coal-mining point. The mines there are located along the line of what is known as the Middlesboro railroad. Some of these mines are in Kentucky and some in Tennessee. This coal is gathered up at different points along the Middlesboro line, and tendered to the Louisville and Nashville road for shipment at its yards or point for receiving coal in Middlesboro. It would be clearly an unjust discrimination to enforce a different set of rates from mines located in the same mining district to Louisville, or other points in Kentucky, and yet otherwise the facilities now enjoyed for the movement of interstate traf-ic from the mines just below the State line, in Tennessee, would be impaired or withdrawn because of the rates which the law, so construed, would require should be enforced from Kentucky mines in the same territory.

Coal is mined also on the line of the Cumberland Valley division of the Louisville & Nashville road, in Virginia, and is shipped to points in Kentucky, including Louisville. The rates from these mines are lower to Louisville than they are to some intermediate points, and are properly made with regard to the rates on coal from Middlesboro and from Jellico. A readjustment of the rates from Middlesboro and from Jellico to Louisville that would ex-
75 clude those mines from participating in the Louisville trade would call for a readjustment of the rates on coal mined in Virginia and shipped from points on the Cumberland Valley branch of the Louisville & Nashville road to the same point. If so, this would exclude the Virginia coals from the Louisville market, equally with the Jellico coals and the Middlesboro coals, and so would result in restricting or impairing the facilities for interstate

commerce, because of the application of the Kentucky law so construed to rates of the Louisville & Nashville road, a restriction or an impairment to which such interstate traf-ic is not now subjected, as it enjoys rates which permit of competition under the interstate-commerce law.

The dilemma presented to the managers of the Louisville & Nashville road, therefore, would be, under the construction of the Kentucky law as mentioned, whether to avoid the charge of unjust discrimination between shippers similarly located by applying the same rate on coal over the same line to the same point or points of destination, coming from adjacent territory in Tennessee and in Virginia, and thereby impair the facilities now enjoyed for interstate commerce and materially affect and impede the movement of such interstate traf-ic, or to subject the company to the charge of unjust discriminations and permit the interstate movement of coal from Tennessee and Virginia mines to Kentucky points as it now moves, while excluding Kentucky mines.

Other instances of similar anomalies are readily presented.

76 Competitive conditions exist at Lexington, Ky., which properly permit the railroad from Cincinnati to Lexington under the interstate-commerce act to make lower rates from Cincinnati to Lexington than to intermediate points. Yet, under the Kentucky requirement referred to, the same considerations would not permit the railroads from Louisville to Lexington to make a similar adjustment of rates.

Competition at Bowling Green, Kentucky, growing out of the navigation of Green and Barren rivers, requires interstate carriers under the interstate-commerce act to make low rates to meet that competition between Evansville, Indiana, and Bowling Green and between Cincinnati and Bowling Green, without compelling them to sacrifice the rates they charge on intermediate business. But the railroad company would not be allowed, under the conditions of your question, to make correspondingly low rates between Louisville and Bowling Green without reducing its reasonable rates to intermediate points under that Kentucky requirement.

Competition of boats in the Ohio river necessitates lower rates by rail between Louisville and Cincinnati than may reasonably and lawfully be charged to intermediate points, and under the interstate-commerce act the Kentucky roads can and do legally and properly charge more to the intermediate points than they do between these terminal points. Yet, under the Kentucky long and short haul law, the Kentucky railroads cannot charge any less between Newport and Covington, on the one hand, and Louisville, on the other, than is charged to the intermediate points, although the same conditions prevail at Newport and Covington as prevail at Cincinnati.

77 Competitive conditions of the same character exist at Evansville, Indiana, and Henderson, Kentucky. Under the interstate commerce act the railroads passing through Kentucky can lawfully recognize those competitive conditions at Evansville and make less rates between Kentucky points and Evansville than for the

shorter intermediate hauls wholly in Kentucky, when, according to that Kentucky rule, they cannot lawfully recognize the competition at Henderson or make such lower rates to and from Henderson.

Owensboro, Kentucky, by reason of its situation on the Ohio river, enjoys very low rates; but, under that requirement, Kentucky shippers cannot share in the trade of Owensboro unless the Kentucky railroads can reduce all the intermediate rates to the same low basis as the Owensboro rates, which would be impracticable; but points in other States can, under the interstate commerce act, continue to enjoy that trade, and, in fact, crowd the Kentucky shippers out of it, because an adjustment of rates may be made recognizing the competition at Owensboro without necessitating similar rates to intermediate points.

Maysville, Kentucky, and Ashland, Kentucky, on the Ohio river, can continue to enjoy low rates from Cincinnati and other points in other States without the railroads being compelled to reduce intermediate rates to the same low basis, but Louisville and other Kentucky places will be deprived of participation in trade with Maysville and Ashland, inasmuch as the Kentucky railroads cannot afford to reduce all intermediate rates to the same low
78 basis that must obtain with reference to Maysville and Ashland business, in view of the competitive facilities which those places enjoy.

In each of these cases and in countless others that could be enumerated the effects of the requirement referred to upon interstate commerce are apparent. The present relative commercial attitude of places in Kentucky and places outside of Kentucky will be materially altered, thereby necessarily affecting interstate commerce, and just so far as railroads may strive to prevent the unjust discriminations which will thereby arise in the same degree will the Kentucky requirement become a direct and controlling regulation with respect to strictly interstate traf-ic.

The enforcement of the Kentucky requirement would mean a decided impairment of the Louisville & Nashville Railroad Company's revenues and a corresponding impairment in its train service, to the detriment, not alone of State traf-ic, but also of the interstate traf-ic, since both characters of traf-ic are necessarily accommodated by the same train service. The direct and necessary effect of this would, of course, be a decided and unfortunate burden upon the interstate traf-ic as well as upon the State traf-ic.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objection to the question, and still claiming under and relying on said subsection 1 of section 10 of ar-
79 ticle 1 of the Constitution of the United States and on said section 1 of the fourteenth amendment thereto for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly, but the court still decided each and all of said contentions against the defendant and refused to permit the witness to answer the question; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

7 Q. Please explain the various sorts of competition which affect railroad transportation and how they affect that transportation. Are the instances rare or numerous where these various sorts of competition affect railroad transportation? State whether or not such competition affects the policy or convenience of the carrier only. If railroad companies could charge higher rates to or from intermediate non-competitive points and lower rates to longer-distance competitive points only when the right to give such recognition to competition were authorized by a railroad commission, would the action of such commission affect the convenience or policy of the carrier merely?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Counsel for defendant thereupon avowed that the witness, if permitted to answer the question, would answer truly as follows:

80 There are many and various sorts of competition affecting not the physical movement of the traf-ic nor the cost thereof to the carrier, but the rates that may be or should be charged for the service. There is competition, so termed, between markets. For illustration, coal mined on the Knoxville division of the L. & N. Railroad Co. is offered for sale not only at local stations in Kentucky, but at points or markets of consumption like Louisville, Lexington, Maysville, Covington, Newport, etc., where it meets the competition of coal mined in other parts of Kentucky, and in other States besides Kentucky, such as Pennsylvania, Ohio, Indiana, West Virginia. This competition with producing markets in other States having coal to sell in these different consuming centers controls the price—that is, the rate of transportation—that the Louisville & Nashville railroad may be able to secure from Altamont, Pittsburg, Grays, etc., to Louisville, Covington, Newport, Maysville, as the case may be. This competition between markets, widely separated, but producing the same commodity for sale at different points, is strongly illustrated in the case of rates on coal to Louisville, and equally so in the case of coal transported to other Ohio River points from Kentucky mines, such as Cincinnati, Covington, Newport, &c.

Pig iron manufactured in Alabama and Tennessee is sold at Chicago in competition with pig iron from Ohio, Illinois, and Wisconsin. Southern pig iron seeks markets of consumption throughout the North and West as well as in the East, and makes the
81 competition of pig iron produced in Illinois, Ohio, Virginia, Pennsylvania, &c. The competition between these widely separated markets of production at common points of consumption is a condition affecting the rates that can be secured for transportation.

Lumber from Indiana competes with lumber from Kentucky at Cincinnati, Evansville, Louisville, etc.

Pine from Arkansas and Mississippi comes into competition with pine from Michigan. These are controlling factors in fixing the rate that can be secured for moving lumber from these several com-

peting markets, factors which, on account of different conditions and circumstances, affect the transportation, although not incidents connected with or controlling the physical movement of the commodity.

Then there is the competition between carriers—that is, between the same or different kinds of transportation, whether that be by means of rail, river, or wagon. The L. & N. railroad is engaged in transportation by rail, but on an appreciable part of its traffic wagon competition is a controlling element in establishing conditions which fix the rates that can be secured by it. Competition with steamboats plying navigable streams is among the most effective of all kinds of competition as affecting rates on account of its cheapness. So the question of competition is not by any means limited as to whether or not there are two or more railroad lines competing or crossing at a given point or running between
82 the same points of origin and destination. On the contrary, competition with wagons or with steamboats is, in many cases, as effective in creating or controlling conditions which affect rates as is competition between two or more railroad lines. The competition to which I have reference, whether between markets or between different kinds of transportation, is marked and controlling at so-called local stations as well as at junction or competitive points, meaning, in this use of the word, those points where two or more rail lines connect or compete. By local stations I mean a station that is reached by only one railroad line, such as Lebanon, Kentucky. Competition exists and has its effects upon the rates that may be charged to and from such points. For instance, the Louisville & Nashville railroad desires, in the proper promotion of the interests of communities and industries on its lines, to transport coal from mines at Pittsburg, Altamont, or Grays to Lebanon, and to afford reasonable inducements to those living at Lebanon to buy their coal at those or other adjacent Kentucky mines. It must, therefore, adjust its rates with a knowledge that coal is brought to Louisville by the Ohio river at a nominal cost for transportation and sold at Louisville for consumption there and shipment beyond at low prices, and if the rates from Pittsburg, Altamont, Grays, and other mining points on the Knoxville division and Cumberland Valley branch are not properly adjusted, such coal so offered and sold on the Louisville market from Pennsylvania and West Virginia could be and would be shipped from Louisville to Leb-
83 anon in place of the coal from Pittsburg, Ky., Altamont, &c.

The rates that may be charged from so-called "local stations" on the Cincinnati Southern railroad, for illustration, on live stock to Cincinnati, Louisville, etc., are affected or controlled by the rates that are charged from so-called "local stations" in same territory on the Knoxville division of the Louisville & Nashville railroad on live stock to same points.

Numerous other illustrations might be given as to competition between the carriers affecting rates from what we generally term and what in the public mind are usually considered as local stations.

There are other kinds of competition. One of them is sometimes defined as competition between products. That also has an influence over rates. I mean the question of bringing into the market of consumption one kind of freight or commodity in competition with another. Coal comes into competition with wood, and, in many cases, also into competition with coal oil and gas, as a fuel. Bran and ship stuff, corn and oats from the West, come into competition at different points in the South with cotton-seed meal as stock feed.

Building stone from Bowling Green quarries in Kentucky or Bedford quarries in Indiana comes into competition in the East with granite from Vermont for building purposes, and this condition is a matter affecting rates that can be secured and deciding the question whether Indiana or Kentucky stone can or will be used by the architects and builders in Washington, New York, Philadelphia, etc.

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For street-paving purposes vitrified brick, granite blocks, wooden blocks, and asphalt are all in competition. Other things being equal, the cost at which these commodities may be delivered at point of consumption will decide the matter, and this question becomes the controlling factor in the matter of rate that can be secured for hauling the granite, the wooden paving blocks, or the brick from point of production to point of consumption. At the present time the matter of paving material from Alabama to New Orleans by rail is being considered with respect to the conditions existing as to the delivery of other paving materials such as asphalt by water at New Orleans. This competition at that point more directly controls or more sensibly affects the rates than it would at some interior point not located on a water-course as New Orleans is. The competition, however, still exists at interior points on these commodities different in degree, but not in kind, and the same circumstances and conditions would have to be and are considered in fixing the rates at such interior points. It will be seen, therefore, that the instances instead of being rare are numerous where these various sorts of competition affect railroad transportation and the rates charged. It must be apparent that these conditions of competition do not effect the policy or convenience of the carrier only. On the contrary, they very materially affect the interests of the shipper and the consumer and of all communities involved. This effect is in some aspects felt more and is probably relatively greater in considering the competition affecting rates at a point like Lebanon than at a point like Louisville, because the city of Louisville is so fully supplied with transportation facilities and has access to so many markets from which to obtain its supply of coal and other commodities that the adjustment of rates on coal, for instance, by the Louisville & Nashville railroad to Louisville from its Kentucky mines would not materially affect or control the question of fuel supply to Louisville consumers. Moreover, it is an important question to the producers and shippers of coal-operating mines along the line of the L. & N. railroad, and the proper consideration of these conditions is a matter

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of material interest to the consumer of coal at Lebanon. It follows with equal truth that the right to meet the situation growing out of these different kinds of competition, and to give recognition thereto only as authorized by the railroad commission, whether such action of the commission be for or against the right and authority of the railroad to charge higher rates to or from intermediate non-competitive points, affects the convenience, welfare, or policy of a large number of interests besides those of the railroad company. The carrier is not the only one involved, but, on the contrary, the shipper and the consumer are equally interested in the proper decision of the question as to the
86 dissimilarity of the circumstances and conditions and the rates properly to be charged under such dissimilarity. It is not perhaps too much to say that the entire investment in coal operations at Grays, Altamont, Pittsburg, and other points along the Knoxville division of the Louisville & Nashville railroad and the returns legitimately to be expected therefrom would be dependent, under such a condition of affairs, upon the decision of the commission of the State of Kentucky as to the right of the railroads to charge such rates to Louisville, Newport, Covington, Maysville, etc., as will permit such mines to share in the coal trade at these points, and therefore affect not only the investment of the owners of those mines, but of many thousands of miners engaged in their operation and of the widely extended lines of interests connected therewith.

The court still refused to permit the witness to so testify or to answer the question; to which action of the court the defendant, by counsel, excepted at the time and still excepts.

8 Q. Does the fact that a railroad company can haul competitive traf-ic at low rates without loss show or tend to show that it can haul non-competitive traf-ic at similar rates without loss, or does it show or tend to show that the rates for the non-competitive traf-ic are too high or are relatively unjust?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.
87 Counsel for defendant thereupon avowed that the witness, if permitted to answer said question, would answer truly as follows:

In my judgment it does not either show or tend to show such a result. I have indicated that a large part of the total expenses of a railroad consists of fixed expenses not dependent upon the amount of business handled, or, if so, only changing in a very slight degree, many of them not subject to change at all. Now, these expenses have to be paid from the total revenue of the company. The railroad companies have no sources of revenue except earnings from the traf-ic passing over their lines, from the freight, passenger, mails, and express business. If, therefore, a railroad company, having fixed its local tariff at a fair and reasonable figure, continues to charge that tariff while it may get other business which pays it less

than its local business proper, it is evident this addition to the gross receipts of the company finally results in benefit to the local points. In other words, a railroad built to accommodate the several communities in the territory through which the line runs fixes its rates and offers its services for transportation. In every case those rates are lower than the communities previously paid for much inferior facilities, if the railroad runs through a territory in which railroad transportation is necessary, and the railroad has a right to expect that the communities tributary to it shall produce sufficient traf-ic from which to secure the necessary revenue to pay a reasonable return on the investment,
88 maintain the property, pay the operating expenses, taxes, etc. If, after the construction of such a line, the management of that company finds that it can secure additional business from communities not tributary to the line, not dependent upon the line, from which additional business it will secure additional revenue not previously contemplated, it follows that no one is injured. The communities for whom the line was built certainly are not in any way imposed upon, and the railroad company secures some benefit from the additional revenue thus derived, and the final result is that in handling this through traf-ic, as it may be termed, and enjoying the revenue thus secured, the railroad company is enabled to make lower charges to its local communities and give improved service in the way of better road-bed, more trains, faster trains, better equipment, etc.

The court still refused to permit the witness to answer the question or to so testify; to which, the defendant by counsel, excepted.

9 Q. State whether or not rates are or can be fixed with reference to actual cost of transportation estimated with reference to necessary outlays and expenditures in carrying passengers, loading, moveing, and unloading freight trains, or fixed at all with reference to the actual cost of transportation.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.
89 Counsel for defendant thereupon avowed that the witness, if permitted to answer said question, would answer truly as follows:

It is not practicable to ascertain the cost of loading, moving, and unloading freight trains as a part of the total expenditures necessary to operate and maintain a railroad property, much less is it possible to estimate the cost of moving any particular commodity, whether by the ton, package, or hundred pounds, between some two designated points taken out of the entire operations of the railroad line. If for no other reason than the impracticability, rates are not and cannot be made with reference to the so-called actual cost of transportation. The cost to the railroad company is an unknown factor. No statistics, however elaborate, have yet been compiled to show what the cost will be at some time in the future of moving a particular article from one point to another, handled as it is, as a

part of the general business of the railroad. The railroad company does keep statistics to show what might be termed an approximate or alleged cost per unit of tons handled, for all freight, for a period of twelve months or other period, but these statistics, even in their imperfect shape, simply report the expense incurred bythe company in transactions already completed, while the freight rates have to be made in advance and in anticipation of a movement that is indefinite, uncertain, and in the future. The alleged cost of transportation as used in railway statistics is compiled, not with any view of
90 governing or controlling rates to be assessed in the future on an indefinite movement of traf-ic, but is considered by the management for the purpose of comparing from year to year or from month to month the result of operations with respect to whether the property is being handled economically or extravagantly. As there is no possible way of figuring the cost of the movement of any one class of freight even between all the points on a railroad, so there is no way of figuring the cost of movement of any one class of freight between any two points on a railroad, and therefore the question of cost cannot be taken and is in no case in any part of this country taken as a controlling factor in the fixing of charges for the transportation of freight. Railroad statistics use the expression "the average cost per ton per mile" or "average expense per ton per mile," and that is simply to reduce to a unit for convenient reference and comparison from time to time the total expense paid by a railroad company in handling its property. That average expense per ton per mile is used to represent the cost of moving one ton per mile. That is what is intended to be shown or approximated, but it does not mean and was never intended to mean the expense of moving any one particular ton over any one particular mile of road. It is arrived at by taking the entire tonnage of freights handled during the period of twelve months or one month, as the case may be, multiplying each ton so carried by the distance it was carried and dividing the results so arrived at into the oper-
91 ating expenses. This number of tons carried one mile, therefore, is made up of all of the hundreds of thousands of transactions, including the movement of a car-load of coal, for instance, from the mine five or ten miles to a coke plant, a box of dry goods, boots and shoes, silks, or a car-load of pig iron, which may move 300, 500, or 1,000 miles over the same road. It varies from the transportation of a car-load of tea worth many thousands of dollars to the transportation of a car-load of mill cinder or slack coal of little or no value at all. There is no way in which the statistics can be kept that would show, therefore, the cost of transporting coal as one of the instances in the entire service performed by the Louisville and Nashville railroad from Pittsburg, Ky., to Lebanon, taken in connection with and as part of the entire freight movement of the Louisville and Nashville railroad. Moreover, the expenses which are assigned to the freight department are, in many cases, and of necessity have to be, arrived at largely in an arbitrary manner. There are some of the expenses which are directly incurred in the movement of freight, as, for instance, the expense of

engines and cars in freight trains, the wages of engineers and firemen on freight trains, wages of agents, clerks, and laborers whose duties are confined exclusively to the freight business; but at the same time there are going on and have to be paid by the company large expenses not directly in connection with either the freight or the passenger business. That would include superintendence; large sums annually expended in the
92 maintenance of track—that is, the repairs and renewals of rails, cross-ties, ballast, ditching, reconstruction of bridges, culverts, and numerous other expenses connected with the road department, which cannot be accurately assigned to either passenger or freight. A very large percentage of the total number of agents employed by any railroad company perform duties both for the passenger and freight departments. The supervision of the operations, of superintendence, includes passenger and freight. The expense for interest, taxes, and other obligations are not incurred by one or the other department, but are joint. Those are only a few illustrations of the reasons why it is impossible to ascertain the actual cost of moving any one ton of any particular class of freight between any two designated points.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

10 Q. In what way, if at all, can the mine-operators, miners, coal-consumers, or the general public be concerned with the cost to the railroad company of the transportation of coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Counsel for defendant thereupon avowed that the witness, if permitted to answer the question, would answer truly as follows:

93 Not at all. Rates are not fixed with reference to the cost of transporting any particular article of freight between two or more designated points. They are fixed by conditions which have heretofore, somewhat at length, been referred to. The public is interested in knowing that those conditions are properly considered, so that their charges may be correspondingly and properly adjusted. They just to an equal extent have no interest, therefore, in the question of cost to the railroad company of transporting coal. Not only mine-operators, miners, coal-consumers, but the general public are interested in having their rates so adjusted that they can continue to do business to the satisfaction of themselves and their customers and at a reasonable profit. They have no more interest in the cost of transporting coal than they have in the cost of transporting flour, or dry goods, or wagons, or any other of the thousand articles that go to make up the freight business of a railroad. They are interested in the railroad's securing sufficient revenue to properly maintain its road and equipment, pay its obligations, and give good and efficient service.

The court still refused to permit the witness to so testify or to answer the question; to which ruling of the court the defendant, by counsel, excepted.

11 Q. Please state the various accounts which go to make up the operating expenses of a railroad company, and show, if you can do so, the relation which those accounts bear to each other in amount, and the relation which they bear to the fixed
94 charges and other expenses of a railroad company which are not embraced in operating expenses.

A. The operating accounts of railway companies are, as a general rule, divided into four main accounts or general headings, in accordance with formulas prepared and directed to be used by the Interstate Commerce Commission. These are designated maintenance of way and structures, maintenance of equipment, conducting transportation, and, fourth, general expenses. Under these four general operating expense accounts there are, in the accounts of the Louisville & Nashville railroad, 56 sub-accounts. In each one of these sub-accounts a great number of items enter to make up the total expenses under each sub-account and the total expenses under each general account, and, finally, the total of the operating expenses. It has been claimed that in some cases the additional cost of handling new or additional traf-ic is very slight. By additional cost I mean the actual additional expense incurred on account of moving that specific freight. This is because there are many elements of operating expenses which do not vary in line with or do not vary at all with the actual tonnage of traf-ic handled. Of the total expenditures incurred by the Louisville & Nashville railroad for the fiscal year ending June 30th, 1898, the operating expenses aggregated 71.21 per cent.; taxes, State, county, and municipal, 3.06 per cent.; interest on bonded debt, discount, payments account leased and controlled lines, 25.73 per cent. Of the total expenditures, therefore,
95 necessary to the operation and maintenance of the property, it appears on first consideration alone that 28.79 per cent. have no relation to and are not in any way controlled by the volume of traf-ic handled, nor whether the same is increased or decreased, being made up of interest, discount, payments to leased lines, taxes, &c. Of the remaining accounts it is equally apparent that the general expenses of superintendence or supervision, including salaries, clerk hire, office rent, office expenses, of officials, such as the president, vice-president, secretary, treasurer, general manager, traf-ic manager, general freight agent, general passenger agent, comptroller, auditors, chief engineer, division superintendents, superintendent of machinery, etc., which amount to 5.39 per cent., are not related to or controlled by the volume of traf-ic handled. Under the general headings of maintenance of way and structures, maintenance of equipment, and conducting transportation, the following represents the percentage that each of these accounts bears to the total expenditure of the Louisville and Nashville railroad for the fiscal year ended June 30th, 1898:

96 *Maintenance of Way and Structures.*

Main track and roadway	4.51
Side track and switches	.80
Cross-ties, renewals of	2.10
Rails, renewals of	.90
Watchman of track and bridges	.37
Bridge and culvert repairs	2.49
Depot repairs	.36
Shop-building repairs	.28
Section-house repairs	.10
Water-station repairs	.22
Dredging and repairs of docks and wharves	.06
Telegraph repairs	.01
Extraordinary expenses—washouts, etc	.97
Improvements—way and structures	2.02
Total	15.19

Maintenance of Equipment.

Locomotive repairs	4.54
Passenger, baggage, express, and postal car reprs	1.48
Freight car repairs	7.22
Sleeping car repairs	.003
Shop machinery and tools	.19
Improvements—equipment	1.13
Total	14.57

Conducting Transportation.

Conductors, baggagemen, and brakemen	5.23
Hire of locomotives and cars	1.47
Injuries to employés	.58
Injuries to persons (not employés)	.64
Engineers and firemen	4.39
Round-house expenses	1.24
Oil and waste used by locomotives	.16
Water for locomotives	.34
Fuel for locomotives	5.87
Loss and damage:	
Baggage	.001
Freight	.48
Property	.12
Stock killed	.62

97 Station expenses:

Agents and clerks	2.41
Baggagemen, porters, furniture, fuel, lighting, &c	.58
Labor—loading and unloading freight	1.22
Watchmen at depots and crossings	.31

Switching:	
Switchmen	2.02
Engineers and firemen	.92
Locomotive repairs	.48
Round-house expenses	.03
Oil and waste	.03
Water supply	.05
Fuel	.77
Sleeping car hire	.25
Sleeping car expenses	.17
Train expenses:	
Inspecting cars, cleaning, oil and waste, lighting, heating, links and pins, train supplies	1.85
Telegraph expenses	1.02
Wrecks (clearing)	.21
Advertising and soliciting	1.01
Rents (tracks, yards, and terminals)	1.58
Total	36.06

I have shown that of the total expenditures of the railroad company, 34.18 are not connected with nor affected by the question as to whether the tonnage of coal or any other commodity is increased or decreased. Now, these expenditures, such as I have above stated, representing the remaining expenses in the operation of the property, amount to 65.82 per cent. As a general thing, the title or heading of the account tends to show pretty clearly the nature of the expense involved. And it will be seen that only a small part of these expenses is increased and only a small part decreased as the volume of business handled is increased or decreased. To illustrate, in maintenance of way and structures, expenses for repairs of road-
way, repairs or renewals of bridges and culverts, repairs and
98 renewals of fences, repairs or renewals of telegraph, have no connection or fixed relation to the volume of traf-ic. Taking these question- of rails, while it is true the expense for the renewal of rails might be increased or decreased by changes or fluctuations in the tonnage of business over the road, to what extent that is the case it is impossible to estimate. Under the same general heading will be observed accounts for repairs and renewals of buildings, docks, and wharves, dredging, improvement to the permanent way and to structures, telegraph repairs, and extraordinary expenses, which are not dependent upon or affected by the volume of freight. In the next general heading, maintenance of equipment, there are five sub-headings. Some of these are wholly independent of the volume of business handled. There are, of necessity, fixed expenses in the maintenance of equipment, whether it is in active service or not. There are 31 sub-headings set forth in the next schedule, under the heading of conducting transportation. Some of these may be decreased or increased according to the volume of business handled; such, for instance, as the wages

of trainmen, fuel for locomotives, train supplies, train expenses; but the expense of telegraph service, switchmen, flagmen, watchmen, rents, as well as a number of other items going to make up the total which is under that head, are not affected by the fluctuation in the volume of business.

Thus, unfortunately, the expenses cannot be decreased in line with the changes in business, except to a very limited extent.

99 There is one important and controlling condition in this question of the cost of moving, loading, and unloading freight trains, and that is, even where it is practicable to assign a portion of the operating expenses as being of such a nature as to be increased or decreased by whether certain traf-ic is handled or is not handled; the statement shows that there is no division of these expenses, as a general thing, between the passenger and freight departments—that is, as to the expenses of handling passenger trains and the expenses of handling freight trains. Attempts are made by arbitrary rules for matters of convenience by many companies to assign expenses as between passenger and freight respectively. So uncertain are these results and so little value is attached to them that the Interstate Commerce Commission, through its statisticians several years ago, after investigation, issued instructions to railway officials that thereafter no attempt should be made to apportion the expenses in the operations of railway properties as between passenger and freight.

12 Q. Please give, if you can do so, the number of articles which is embraced in the classificarion of freight, and give an idea as to the variation between the highest and lowest rates on articles of different classes for any given distance.

Objected to by counsel for the Commonwealth as having nothing to do with this question, the only inquiry being as to one class of freight, coal, between two points.

100 The court sustained said objection; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The number of articles covered by different classifications on different railroads vary, say from about 2,800 to 3,500. Probably more than that number of articles are named in some classifications. My recollection is that the local classification of the Louisville and Nashville railroad contains something over 2,800 to 3,000 different articles, besides in many cases reference to articles similarly classified or analogous articles. The variation between the highest and lowest rates on articles of different classes for a given distance is very wide. For instance, the local freight tariff of the Louisville & Nashville railroad for 100 miles provides a charge on first-class freights of 55 cents per hundred pounds. Its rate for the transportation of coal that distance would probably amount to 7½ cents per hundred pounds. Coal is one of the lowest articles of transportation, but sand, brick, cement, lime, and other low-class freights are also carried at correspondingly low rates. On the other

hand, many articles of merchandise take a higher rate than first class—some of them double first class, and some three times first class. The variation in rates, therefore, from this illustra-
101 tion of local tariff would be as between, say, $1.65 per hundred pounds to 7½ cents per hundred pounds for transportation of different classes of freight between the same points for a distance approximating 100 miles, or in the proportion of over twenty to one.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

13 Q. State whether or not this variation is or can be in proportion to the difference in the cost of transportation, and, if not, state how the different rates for different classes are established, and how the various commodities which are the subject of transportation are apportioned among the various classes?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

This variation is not and cannot be fixed in proportion to the difference in the cost of transportation. The assignment of three or four thousand articles of transportation to a few classes involves of necessity a more or less arbitrary exercise of good judgment and discretion, and the classifications of the country are the result of many years of experience, aided by numerous conferences
102 between railroad officials and between railroad officials and shippers, manufacturers, consumers, and others interested. In no case in my experience has it been attempted to define or fix the classification of any article under which classification a rate would become fixed or affected by the question of cost of transportation. The relative value of the article to be transported is at times considered. The value of the service performed is a consideration. The character of the article to be carried and the shape in which it may be offered for transportation is a circumstance affecting the classification. The bulk of the article and its value as related to bulk or space occupied is considered. While I speak of the arbitrary exercise of judgment, yet every effort is made by railroad officials to ascertain all the facts bearing upon the question of classification of any one article, and frequently experts are employed for the purpose of carefully and correctly getting together all of the available information from which to form a correct conclusion. It is quite apparent that the classification is not to be fixed by the question of cost, because, once adopted, it must apply over many different lines in different sections of the country or in different parts of the same territory, where the transportation cost may vary each day in the year and for each portion of the line over which transported. The mere cost incident to movement may, aside from the question of risk involved and

claims to be paid in the event of accident, be practically the same for a car-load of tea weighing 20,000 pounds
103 and a car-load of lumber, yet no one would expect, because of this equality in "cost of moving, loading, and unloading," that a car-load of tea should be hauled for as low a price per hundred pounds as a car-load of lumber. There may be no immediate greater cost in moving a car-load of dry goods, worth many thousand dollars, over the moving of a car-load of pig iron between the same points of origin and destination, yet it would be impracticable for the railroads and unjust to the shippers to charge as much for the car-load of pig iron as for the car-load of dry goods, or, on the other hand, to haul a car of dry goods for as low a rate as the railroads might be willing to haul a car-load of pig iron. There may be no appreciable difference in the mere cost of moving a car-load of feathers or wool and a car-load of coal, one an article of very light bulk and great value and the other an article of low value, but it would be unjust to carry wool or feathers between any two points for the same rate as might be charged for the carriage of coal.

14 Q. What difference in kind is there between the factors which determine the rates to be charged on different commodities between the same points and the rates to be charged on the same commodities between different points, when one of these points is a competitive point and the other is a non-competitive point?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

104 Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

There is no difference in kind between the factors to determine the rates to be charged on different commodities between the same points and the rates to be charged on the same commodities between different points, when one of those points is a competitive point and the other a non-competitive point. There may be different degrees or different elements of comparison, and there are, of course, a greater or less number of considerations, at times, to be given in deciding one or the other of such questions. The final conclusion has to be reached by the same or similar consideration of the same or similar conditions, and that is the circumstances and conditions affecting the rates that may be properly charged or secured for transportation.

In the decision necessary to be reached in fixing classification and assigning the different articles or commodities to be transported to one of the half-dozen classes in such classification, the factors determining may and do, in many cases, become extremely intricate. On the other hand, it is at times possible to very clearly show, as in the case of coal from Pittsburg, Ky., to Louisville, exactly what can be secured for transportation, and what can therefore properly be charged for such transportation,

and permit the tra-fic to move, assuming that by the use of
105 your terms you mean, in the one case, Lebanon, as a non-competitive point, and, in the other case, Louisville, as a competitive point.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

15 Q. State the circumstances and conditions other than those, if any, relating to cost of service under which coal was, in October, 1894, and is now, transported from Altamont to Elizabethtown, and wherein those conditions differed, if at all, from the conditions affecting the transportation of coal from Altamont to Lebanon; and state the effect at that time of the recognition by the railroad company of the conditions affecting the transportation to Elizabethtown, with reference to transportation to that point, which did not affect the transportation to Lebanon, and what would be the effect of denying the railroad company the right to recognize those conditions.

Counsel for the Commonwealth objected to circumstances and conditions outside of those affecting the cost of transportation.

Counsel for defendant resisted said objection and claimed that the question was proper, and that the facts which would be disclosed by the answer thereto would be relevant and competent under a proper construction of section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes.

106 Counsel for defendant further stated that the defendant claimed, under section 1 of article 14 of the amendments to the Constitution of the United States, prohibiting any State to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws, the right, under the circumstances which would be disclosed by said answer, to transport coal from Altamont and other coal-shipping points to Lebanon at the rate of $1.55 per ton or other just and proper rate, and at the same time to transport coal from Altamont and other coal-shipping points to Elizabethtown at a less rate.

That section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes if so construed as to prevent said practice under the circumstances which would be disclosed in the answer to said question, would have the effect, arbitrarily and without any justification or excuse, of compelling the defendant to give up such transportation of coal to Elizabethtown and the revenue accruing to it therefrom or of requiring the defendant, arbitrarily and without any justification or excuse, to reduce materially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points without any inquiry, judicial or otherwise, to ascertain whether said last-named rates were unjust or unreasonable, and when in fact reasonable, and that therefore said con-

stitutional and statutory provisions of the State of Kentucky,
107 so construed, are unconstitutional and void because in conflict with the aforesaid provisions of the Constitution of the United States.

The defendant, by counsel, further contended that by reason of the contract existing between it and the Commonwealth of Kentucky, resulting from the acceptance by it of the charter granted to it by the Commonwealth of Kentucky, it had the right to engage in the transportation of traf-ic, and to receive revenue therefor, of which right the Commonwealth of Kentucky could not deprive it; that if the character of traf-ic to be accepted by it or the rates to be accepted for such traf-ic could be subject to regulation at all by said Commonwealth of Kentucky, it could only be a just and reasonable regulation, having for its objects the promotion of the public welfare, and that any arbitrary regulation, either requiring the defendant, without any justification or excuse, to give up entirely the transportation of coal from Altamont and other coal shipping points to Elizabethtown, or of requiring it, arbitrarily and without justification or excuse, to reduce materially its rates on coal from Altamont and other coal-shipping points to Lebanon and other intermediate points, without any inquiry, judicial or otherwise, as to whether said last-named rates are unjust or unreasonable, and when in fact they are reasonable, would be an impairment of the obligation of said contract, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, pro-
108 hibiting any State to pass any law impairing the obligation of contracts; and counsel for defendant stated that the defendant relied upon the right and immunity guaranteed to it by said subsection 1 of section 10 of article 1 of the Constitution of the United States, and that the facts which would be disclosed by the answer to said question would show that section 218 of the Constitution of Kentucky and section 820 of the Kentucky Statutes, if construed so as to exclude from consideration the facts which would be disclosed by said answer, would impair the obligation of said charter contract, as above stated.

The court, however, decided each and all of said contentions against the defendant, and sustained the objection of the plaintiff to the question, and refused to allow said question to be answered; to which decision and ruling of the court and to each and every part thereof the defendant, by counsel, at the time excepted and still excepts.

And thereupon counsel for defendant avowed that the witness, if allowed to answer said question, would answer truly as follows:

Elizabethtown, Ky., is a junction point between the Louisville and Nashville railroad and the Illinois Central railroad, as stated. It is nearer to Louisville than Lebanon is, and Elizabethtown, before the opening of coal mines and the shipment of coal from mines in Kentucky, secured such coal as it used from Louisville, and
109 had lower rates than would be charged for the shipment of coal from Louisville to Lebanon. Mines are in operation on

the line of the Illinois Central railroad, which are much nearer to Elizabethtown than are the mines on the Knoxville division of the Louisville & Nashville railroad, and are daily shipping coal to that point, and the Louisville & Nashville railroad, in shipping coal from mines on its line in the vicinity of Pittsburg, Altamont, or Grays, Ky., finds that its rates are controlled by these conditions, namely, the possible shipment of coal from Louisville to Elizabethtown, which has been brought into Louisville by river from Pennsylvania or other points, and the continued shipment of coal from mines on the Illinois Central to Elizabethtown, and the rates on coal to Elizabethtown, therefore, while higher than to Louisville, are, under these conditions, it may be, lower than to Lebanon. The transportation to Lebanon is not affected by any such conditions. The mines at Altamont are the nearest mines to Lebanon, and consequently neither the rate of transportation nor the transportation itself to Lebanon is affected by any such condition as above stated with reference to Elizabethtown. The effect of recognizing the competition at Elizabethtown is similar in kind, though different in degree, to the effect of recognizing it at Louisville, and gives to the railroad company an additional revenue and to the Southeastern Kentucky coal mines an additional market without effecting any
110 injury to any place. To deny to the railroad company the right to recognize this competition at Elizabethtown would either force it, arbitrarily and without justification or excuse, to give up that traffic to Elizabethtown or compel it, arbitrarily and without justification or excuse, to reduce materially all intermediate rates, without any inquiry, judicial or otherwise, to establish the unreasonableness or injustice of such intermediate rates, and when such intermediate rates are, in fact, just and reasonable.

And thereupon counsel for defendant, for the same reasons urged by him in resisting the objections to the question, and still claiming under and relying on said subsection 1 of section 10 of article 1 of the Constitution of the United States and on said section 1 of the fourteenth amendment thereto, for the reasons stated in resisting the objection to the question, moved the court to permit the witness to answer the question accordingly, but the court still decided each and all of said contentions against the defendant and refused to permit the witness to answer the question; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

Counsel for the Commonwealth declined to cross-examine.

111 JOHN B. ATKINSON, called for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. Where do you live? What is your occupation, and how long have you been so engaged?

A. I live in Earlington, Kentucky. I am president of the St. Bernard Coal Co., and also of the Whitley Coal Company of Ken-

tucky, and I have been engaged in the coal-mining business for twenty-seven years, in Kentucky.

1*a* Q. Where does the St. Bernard Coal Co. have its mines?

A. In Hopkins county, Kentucky.

1*b* Q. And where does the Whitley Coal Co have its mine?

A. In Whitley county.

2 Q. Please state how, if at all, are the transportation of coal and the rates charged therefor by railroad companies connected with the coal trade itself.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

Intimately connected, because most of the coal mines of the United States are located on lines of railroads necessarily used to transport the coal to market; because the transportation of coal in this country requires more cars and engines than does any other profit. The coal tonnage is eighty times greater than that
112 of the cotton crop, sixteen times greater than that of the wheat crop, four times greater than that of the corn crop, and twenty times greater than that of pig iron. Only a small per cent. of the coal produced is sold to the local trade, the greater part of the output of the mines being shipped to terminal competitive points. The freight on coal is an important matter to the coal miner, and a successful operation of the mines depends to a very large extent upon the freight rates. In shipping to competitive points, unless the freight rates are such as enable the coal-operator to put his coal of same quality at such points as low as the miners of other coal-fields, he will be excluded from such market. The coal-mining industry is, therefore, closely connected with transportation by rail, and must depend on the railroads for successful operation. Price of coal in any market depends more on the cost of transportation than on the price of production. The cost of mining and putting the coal on the railroad cars varies but little in any of the coal-fields of the United States; hence the cost of coal in any market depends upon the cost of transportation to that market. To further illustrate: If one coal-field is located 100 miles by railroad from the competitive market, and another coal-field is 200 miles from this market, the quality of the coal being equal, then the transportation charge for carrying this coal must be the same as that charged for carrying the coal 100 miles, in order that the coal brought the greater distance may compete in
113 that market. If the rate be not made equal, then coal from the mine 200 miles distant will be shut out.

The court still refused to permit the witness to answer the question or to so testify; to which the defendant, by counsel, excepted.

3 Q. State to what extent, if at all, you are familiar with the transportation of coal between the Kentucky mines and Louisville,

and between southeastern Kentucky mines and Lebanon, and with the conditions of the coal trade at those places.

Counsel for the Commonwealth objected to the form of the question.

By the COURT: He has the right to state as to his knowledge.

By Judge RIVES: We objected to that part in regard to the coal trade. We do not object to that part of the question which asks if he is familiar with the transportation of coal between the Kentucky mines and Louisville or between southeastern Kentucky mines and Lebanon, but we do object to that part which asks if he is familiar with the coal trade at those places, because that has nothing to do with the question.

By Mr. HINES: We ask the ruling of the court on the question as propounded.

By the COURT: Then I will overrule the motion, but I will have to control the witness in answering. Mr. Atkinson, in making your response to that question you can answer so much of
114 the question as to your familiarity and knowledge as to the transportation between points indicated in the question, but you will not give your knowledge as to the condition of the coal trade at the points indicated in the question.

To the ruling of the court the defendant, by counsel, excepted.

A. I am familiar with the transportation to Louisville, because I ship coal to Louisville from mines at St. Charles, Ky., and also ship coal from Whitley county to Lebanon and Louisville.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would answer truly as follows: I am also familiar with the conditions of the coal trade at those places. I know that the prices at the Louisville market are made by the river coal operator, who brings his coal by river from Pennsylvania and West Virginia mines. The prices made at Lebanon are made by the mine operators at Altamont and other southeastern Kentucky coal operators.

The court still refused to permit the witness to answer the question fully or to so testify; to which ruling of the court the defendant, by counsel, excepted.

4 Q. State whether or not in 1894 coal was or could have been transported from those mines or any of them to Louisville under circumstances or conditions similar to those under which it was transported from the same mines to Lebanon. What have
115 been the facts in this regard since 1894? Explain fully.

Counsel for the Commonwealth objected to so much of this question as asks for circumstances and conditions other than those immediately affecting the cost of transportation service. The court sustained said objection; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would answer truly as follows:

During 1894, and at all times since, coal could not have been transported from southeastern Kentucky mines to Louisville on conditions similar to those under which it was transported to Lebanon. Sales of coal in Louisville from Ohio River mines have been at such prices as would prevent the sale of coal from southeastern Kentucky if the rate of transportation to Louisville had been the same as to Lebanon.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

5 Q. Please state at length the conditions prevailing in 1894 and now in the coal market at Louisville. What controlled the price of coal on the Louisville market? Explain the facilities for transporting coal down the Ohio river to Louisville.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

116 Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

Louisville gets its supply of coal from Pittsburg, Pa., and from West Virginia by means of river transportation, and from Indiana and western and southeastern Kentucky by rail. Coal from Pittsburg, Pa., to Louisville, about 500 miles by river, is transported in barges and boats for less than 50 cents per ton. This low rate of transportation fixed the selling price of coal in Louisville, and this condition existed during 1894 and has existed ever since. It means that all railroads that transport coal to this market must make low rates, else the miners on the said railroads will be kept out of the Louisville market.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

6 Q. State whether or not in 1894 the mines in which you were interested sold coal to local points in Kentucky at the same price at which they sold coal to Louisville. Did those mines lose money by selling coal to Louisville at the lower price? If not, why could they not have reduced their price to all local points to the Louisville price without losing money? Did the fact of the less charge to Louisville than to the local points injure the local points?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

117 Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

During 1894 I shipped coal from St. Charles mine, in western Kentucky, to Louisville, Ky., and to local points in Kentucky and Tennessee. I received from the local points more money for coal than I did from Louisville because the prices in Louisville were not under my control and I was compelled to receive a very small mar-

gin of profit in that market. In theory, each ton of coal mined costs a certain amount, and a reasonable amount added to this for profit makes the selling price of the coal on the railroad car at the mine. Each theoretical miner produces regularly a certain number of tons daily, and the theoretical customer buys this coal at the fixed price. But in practice how different, as many investors in coal-mining property discover when too late. The theoretical customer is never on hand, while certain fixed expense, such as pumping, feeding of stock, interest, salaries, etc., is always with us. The local trade only wants coal to any extent during five months of the year. This means only 140 days' work for the miner, and he should in equity get double the wages for the time worked. This means a large cost for producing the coal, which the local customer would have to pay if only local business were given this mine. This would be my condition at St. Charles mine but for the fact that I get low rates to Louis-
118 ville, Paducah, and Memphis, all competing points, all supplied with cheap coal. My business is largely increased by the demand of these markets, which want coal largely during the entire year. My miner works 250 days or more, instead of 140 days, and requires less wage. Pumping, mule feed, interest, and salaries are not necessarily increased by the increase of business; hence the cost of producing a ton of coal is much less than before, and my local customer, while paying me more for coal than does the Louisville or Paducah customer, gets his coal for much less than was possible had not these competitive markets been opened to me.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

7 Q. Explain how the cost per ton of producing coal was reduced by the mines having access to the Louisville market.

Objected to by the counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Each coal-miner has a large, fixed expense outside of the wages paid his miners. The larger the tonnage produced up to the capacity of the mine, the amount of this fixed expense is reduced per ton. Louisville market consumes more than one-half the product of the St. Charles mine.

119 The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

8 Q. Did access to that market enable the mines to dispose of any grades of coal not marketable at local points? If so, what would have become of those grades of coal if access to the Louisville market had been denied?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

Access to the Louisville market enables me to dispose of the inferior grades of coal, such as nut and pea, and slack, that otherwise would be largely waste products. They are now sources of income instead of expense, as would be the case if the Louisville market should be taken from us, enabling us to sell cheaper coal.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

9 Q. In 1894 could the Louisville & Nashville Railroad Company have charged a higher rate from the mines at Altamont and other places in southeastern Kentucky to Louisville than it did charge? What would have been the result if it had been required to charge no higher rate for the transportation of coal from those mines
120 to Lebanon and other intermediate points than to Louisville? What would have been the result if the right to make the less charge to Louisville had been obtainable and revocable at the option of the railroad commission?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The railroad company could not have charged a higher rate in 1894 from the mines at Altamont and other places in southeastern Kentucky to Louisville and have sold any coal in the Louisville market. To have required the railroad company to receive freight to Lebanon no higher rate than the rate charged Louisville would have resulted in raising the rates to Louisville, and thereby have prevented the transportation of coal from those places to Louisville. The same rule applies to transportation as to mining. Without the competitive business of such cities as Louisville, the miner would, as shown above, have to exist off the local trade with reduced tonnage, charging more for coal than when permitted to sell in Louisville, and with greatly increased tonnage. To charge the local trade the same price for coal as is received in Louisville would bankrupt the miner, and Louisville freight rate to all local
121 points would bankrupt the railroad company. If the right to make the less charge to Louisville had been obtainable at the option of the railroad commission (under the late ruling of our court of appeals), the entire coal industry of the State, involving all the capital invested therein, the thousands of people in the employ of the coal companies, and in fact the general prosperity of the State, would be wholly dependent upon the will of the commission for its success or failure. Arrangements for enlarging and improving plants would be discouraged, for the reason that it would be impossible to foresee what the railroad commission, as now constituted, or some future commission, might do with respect to allow-

ing coal to be hauled to competitive points like Louisville. The commission, as an independent proposition, might be willing to allow the mine operators and the railroad company to make these rates, yet the commission might be influenced by other considerations, such as a desire to coerce railroad companies to comply with the commissioners' views in other respects, on some matters entirely disconnected with the coal trade, and, as a matter of retaliation, withdraw the authority to charge less for the long haul, and thus most seriously injure the mining interests. The commission might, through ill will or prejudice against some particular mine-owner, or management of some railroad company, be influenced to withdraw such rates, or refuse in the first instance to allow it.

In fact the coal-mining interests of the State would be wholly dependent upon the views of any railroad commission that might be elected, and if the allowing or refusing of such rates was
122 left to the railroad commission, I would say that the coal-mining interests of the State would be in the greatest danger. At this time the coal business of the country has largely increased, and I am considering the propriety of increasing the output from St. Charles mine. This mine is on the Illinois Central railroad and 157 miles from Louisville. Other mines on this railroad are within 110 miles of Louisville. The recent decision of the court of appeals makes me doubt the advisability of spending the many thousands of dollars that the enlargement of the mine would require. The increased output would largely be shipped to Louisville.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

10 Q. What amount of capital is invested in southwestern Kentucky coal mines, and how many people are given employment by reason of the operation of those mines?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer said question, would answer truly as follows: Upwards of three millions of dollars is invested in the coal-
123 mining interests of western Kentucky; 5,000 men are given employment, supporting a population of 20,000.

The court still refused to permit the witness to answer the question or to so testify; to which the defendant, by counsel, excepted.

11 Q. Does competition in the business of transportation affect the policy or convenience of the carrier only?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

It does not. It affects many interests vital to the interests of the

State. In the illustration of two coal-mine operations, one 100 miles from the competitive market and the other 200 miles, should the latter be cut out of this market by an advance in rates, the consumer would lose the advantage of competition and generally be compelled to pay more for his coal, while the consumer between the mines and what was the competitive point would pay more also, for the cost of producing the coal would be greater, because of a smaller quantity produced. The competitive conditions which affect the transportation likewise affect the marketing of coal. The price of coal as well as the rate for its transportation are determined by just the same conditions. This is also true of competition in other lines of business.

124 The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

12 Q. In what way are the mine operators or coal consumers or the general public concerned with the cost to the carrier of transporting coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

I don't see that the mine operators or coal consumers or the general public can be in any way concerned with the cost to the carrier of transporting coal, because I do not understand that the cost of such transportation is ascertainable even by the carrier—at any rate, to such an extent as to make it an element which fixes or controls rates in actual practice. What the mine operators, coal consumers, and general public are concerned with is the rate of transportation and the elements which in practice fix that rate. These elements are ordinary business conditions, manifesting themselves in various ways of competition.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

13 Q. State whether or not in 1894 the Chesapeake & Ohio Southwestern Railroad Company charged more on coal from mines
125 along its line to points between those mines and Louisville than it charged from the same mines for the longer distance to Louisville.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

In 1894 the Chesapeake & Ohio Southwestern Railroad Co. did charge more for transporting coal from its mines to intermediate points between the mines and Louisville than to Louisville.

The court still refused to permit the witness to answer said ques-

tion or to so testify; to which action of the court the defendant, by counsel, excepted.

14 Q. Explain the circumstances and conditions affecting the transportation of coal in 1894 from Altamont and other southeastern Kentucky mines to Elizabethtown. Are those circumstances and conditions similar to or dissimilar from the circumstances and conditions affecting the transportation of coal from the same mines to Lebanon?

By Judge RIVES: To so much of this question as asks for circumstances and conditions other than those immediately affecting the cost of transportation the Commonwealth objects.

The court sustained said objection; to which the defendant, by counsel, excepted.

126 Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

In 1894 and since Elizabethtown, Kentucky, buys its coal from the mines at Altamont and other southeastern Kentucky mines, and from the mines on the Illinois Central railroad (the old Chesapeake & Ohio Southwestern Railroad Company), in western Kentucky, the western mines being considerably nearer and fixing the price, and the transportation from Altamont and other southeastern Kentucky mines was then and is now controlled by that competition.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

Counsel for the Commonwealth declined to cross-examine.

W. A. PUGH, called for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. Where do you live, what is your occupation, and how long have you been so engaged?

A. I live in Pittsburg, Laurel county, Ky.; my occupation is selling and shipping coal, in which I have been engaged for fifteen years last past.

2 Q. How, if at all, are the transportation of coal and the rate charged therefor by railroad companies connected with the coal trade itself?

127 Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The transportation and the rates charged therefor by railroads are connected with the coal trade itself, and all are influenced by the same conditions.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

3 Q. State to what extent, if at all, you are familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville, and with the conditions of the coal trade at all of those places, and for how long have you been familiar therewith.

By Judge RIVES: We object to that part of the question in regard to the coal trade. We do not object to that part of the question which asks if he is familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville, but we do object to that part which asks if he is familiar with the coal trade at those places, because that has nothing to do with the question.

By Mr. HINES: We ask the ruling of the court on the question as propounded.

128 By the COURT: Then I will overrule the motion, but I will have to control the witness in answering. Mr. Pugh, in making your response to that question you can answer so much of the question as to your familiarity and knowledge as to the transportation between points indicated in the question, but you will not give your knowledge as to the condition of the coal trade at the points indicated in the question.

To the ruling of the court the defendant, by counsel, excepted.

A. I am familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would answer truly as follows: And I am familiar with the conditions of the coal trade at all of these places and have been for the past fifteen years.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

4 Q. State whether or not in 1894 coal was or could have been transported from those mines or any of them to Louisville under circumstances or conditions similar to those under which it was transported from the same mines to Lebanon. What have been the facts in this regard since 1894? Explain fully.

129 Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows: In my opinion, coal could not have been transported to Lebanon from those mines under the same circumstances and conditions as it was transported to Louisville. The facts were that conditions and circumstances were not similar at the two points. The transportation of coal to Louisville was controlled by the competition

resulting from the coal brought down the Ohio river at very low rates, while no such condition affected the transportation to Lebanon. The price of coal at Louisville is absolutely fixed by the Pennsylvania and West Virginia coal coming down the Ohio river in barges, the cheapest method of transportation known. At proper stages of the river one boat sometimes brings down as many as 30 or 40 barges, each containing about 12,000 bushels of coal—that is, each barge contains as much coal as a fully loaded train of twenty cars can transport, the capacity of coal cars being 600 to 625 bushels each.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

5 Q. When did the southeastern Kentucky coal mines
130 begin shipping coal to Louisville, and under what circumstances and under what arrangement as to transportation, and what has been the effect of that arrangement?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The southeastern Kentucky mines began shipping coal to Louisville in 1883. Circumstances which necessitated the shipment to Louisville were that the local market would not take the output. The effect of this arrangement was that we produced more coal at the same fixed charges. By placing our surplus coal in Louisville, domestic coal and lower grades, the miners got more steady employment and better pay and the number employed increased. This led to an increased demand for all sorts of supplies and farm products, much of which was furnished by the country along the line of the Louisville & Nashville road. For instance, a very considerable additional demand for flour and other mill products was thereby established, much of which was supplied by Lebanon mills.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

6 Q. What has been the effect of that arrangement upon the output of coal and its price to local points?

Objected to by counsel for the Commonwealth. Objection
131 sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would truly answer as follows:

It has very largely increased the output, and the price of coal has been cheapened to all points. In 1883 lump coal sold at the mines for $2.00 and $2.25 per ton. In 1894 the same coal sold at the mines from $1.00 to $1.25 per ton. This decrease could not have taken place except for the decreased cost per ton of production, re-

sulting from the increased output from our having access to the Louisville market.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

7 Q. In 1894, did the southeastern Kentucky coal mines charge the same for coal sold to Lebanon and other places similarly situated that they charged for coal sold to Louisville, and why? Did those mines lose money by selling coal at Louisville at a lower price; and, if not, why could they not have reduced the price to all local points to the Louisville price without losing money? Did the fact of the less charge at Louisville than to the local points injure the local points?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

132 Counsel for the defendant thereupon avowed that the witness, if permitted to answer the question, would answer truly as follows:

We charged the same for coal sold to Lebanon and other places similarly situated, but the coal sent to Louisville met competition, and we took what prices were obtainable, which were necessarily much lower. Despite the low prices obtainable at Louisville it was some advantage to dispose of our surplus there. We could not have sold coal at the same price to all local points as we got in Louisville from the fact that we would have lost money on our entire output had we done so. The fact of sending coal to Louisville under these conditions did not, in my mind, injure the local points. It did not increase the price they paid, but incidentally brought about a decrease in that price.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

8 Q. Explain how the cost per ton of producing coal was reduced by the mines having access to the Louisville market.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

133 By being enabled to put our surplus coal into Louisville a greater amount of coal was produced on the same fixed charges, and thereby it relatively reduced the cost per ton of the entire output.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

9 Q. Did access to that market enable the mines to dispose of any grades of coal not marketable at local points? If so, what would

have become of those grades of coal if access to the Louisville market had been denied?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Access to that market enabled us to dispose of grades of coal not marketable except to a limited extent to local points. Had we not been able to have put this class of coal in the Louisville market we would have had to waste it.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

10 Q. In 1894, could the Louisville and Nashville Railroad Company have charged a higher rate from those mines to Louis-
134 ville than it did charge? What would have been the result if it had been required to charge no higher rate for the transportation of coal from those mines to Lebanon and other intermediate points than to Louisville? What would have been the result if the right to make the less charge to Louisville had been obtainable and revocable at the option of the railroad commission?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The Louisville and Nashville railroad could not have charged a higher rate from these mines to Louisville than it did charge. If it had charged a higher rate we could not have sent the coal there and met existing competition. The result of the railroad commission having the option of revoking rates at will would have destroyed any possibility of making contracts or selling coal in the Louisville market, because, as a business proposition, we could not rely on what the railroad commission might do in the future, especially since its action as to permitting lower rate on coal to Louisville would no doubt from time to time be controlled by the manner in which the railroads might comply or refuse to comply with other requirements of the commission about other matters, although, of course, as to those other matters the coal interests could have no voice.

135 The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

11 Q. What amount of capital is invested in the Southeastern Kentucky coal mines, and how many people are given employment by reason of the operation of those mines?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer said question, would answer truly as follows:

The amount of capital invested in Laurel county will aggregate nearly half a million dollars. 3,500 people are employed by reason of the operation of these mines.

The court still refused to permit the witness to answer said question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

12 Q. Does competition in the business of transportation affect the policy or convenience of the carrier only?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

No; it affects the producer and consumer as well.

136 The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

13 Q. In what way are the mine operators or coal consumers or the general public concerned with the cost to the carrier of transporting coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The mine operators or consumers are not concerned with the cost to the carrier of transportation, but are concerned with the business conditions which determine the rates. In practice I do not understand that the cost to the carrier of transporting coal is a business condition considered by it or capable of being considered in fixing the rate.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

Counsel for the Commonwealth declined to cross-examine.

C. S. NIELD, called for the defendant, being duly sworn, testified as follows:

Direct examination by Mr. HINES:

1 Q. Where do you live, what is your occupation, and how long have you been so engaged?

A. I am general manager of the North Jellico Coal Company, at Grays, Knox county, Kentucky. I opened said *said* mines

137 in 1888, and began shipping coal in February, 1889, and I have been general manager of said mines during and from that time. Before I took charge of North Jellico mines I was for

four years connected with the mines at Altamont, Laurel county, as treasurer and assistant manager.

2 Q. How, if at all, are the transportation of coal and the rates charged therefor by railroad companies connected with the coal trade itself?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer it truly as follows:

In conducting the mining and shipping of coal I have had much experience in obtaining and aiding in fixing rates. My outlet for coal has always been over the L. & N. railroad. The output of the North Jellico mines for 1897 was about 111,000 tons, and for 1898, about 232,500 tons. The output of coal mines depends upon many contingencies, such as the quality of, which creates a demand for it, the thickness of the strata, the facilities for mining, the prices paid to miners, &c., but the market for the output and finding a market, all other contingencies being favorable, is the greatest consideration for the operator, and to find a market the question of transportation rates must be closely studied and considered. If an operator in any section desires to sell coal at Winchester or Lexing-
138 ton, his first step would be to learn all the conditions prevailing at those points as to the price of coal as affected by cost of transportation over the L. & N. and the C. & O. If he learned that he could not put his coal into those places over the L. & N. with its existing rates as against the C. & O., he would see the L. & N. officials and urge such rates as would enable him to compete with the coal operators who shipped over the C. & O. Likewise, in shipping coal to Frankfort over the L. & N., he would have to get such rates as would enable him to compete with the river rates. Likewise, in shipping to Louisville the coal operators in southeastern Kentucky are forced to have such rates as will enable them to sell in competition with Ohio River rates.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

3 Q. State to what extent, if at all, you are familiar with the transportation of coal between the mines in southeastern Kentucky and Lebanon and Louisville, and with the conditions of the coal trade at all of those places, and for how long have you been familiar therewith.

By Judge RIVES: We object to that part of the question in regard to the coal trade. We do not object to that part of the question which asks if he is familiar with the transportation of coal between the southeastern Kentucky mines and Lebanon and Louisville, but we do object to that part which asks if he is familiar with the coal trade at those places, because that has nothing to do with the question.

139 By Mr. HINES: We ask the ruling of the court on the question as propounded.

By the COURT: Then I will overrule the motion, but I will have to control the witness in answering. Mr. Nield, in making your response to that question you can answer so much of the question as to your familiarity and knowledge as to the transportation between points indicated in the question, but you will not give your knowledge as to the condition of the coal trade at the points indicated in the question.

To the ruling of the court the defendant, by counsel, excepted.

A. For about fifteen years I have been familiar with the transportation of coal from mines in southeastern Kentucky to Lebanon, Louisville, and other points.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question fully, would further answer truly as follows:

I have hunted in person markets for the output from the North Jellico mines, and have kept in close touch with prices and rates at all accessible points for my coal for ten years.

The court still refused to permit the witness to answer the question, or to so testify; to which ruling of the court the defendant, by counsel, excepted.

4 Q. State whether or not in 1894 coal was or could have been transported from those mines, or any of them, to Louisville under circumstances or conditions similar to those under which it
140 was transported from the same mines to Lebanon. What have been the facts in this regard since 1894? Explain fully.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

I employ about 350 miners at North Jellico mines. They must have employment as much as possible or they cannot be kept together. It would be impossible to scatter them during spring and summer and then get them together to mine coal for winter sales. Therefore it is necessary to mine and ship coal during the hot and warm weather, and to do this a market must be found. This market for the southeastern Kentucky mines is in Louisville, which is the dumping ground for all our surplus coal. This surplus coal is thrown on the general and competitive market, the market being regulated by coal brought down the Ohio river in barges, which fixes the price for our coal. This surplus coal has to be sold at just such prices as prevail as the result of this condition, and unless the mines of southeastern Kentucky had this dumping ground at Louisville or elsewhere they would be forced to close operations, because the local demand at accessible non-competitive points in this State would not be sufficient to consume one-half of the output of my mine. At no time since I have been operating the North Jellico

mines could coal have been transported from southeastern Kentucky mines to Louisville under circumstances and condi-
141 tions similar to those under which it was transported to Lebanon from the same mines, for it could not be transported to Louisville unless the rate was made low enough to enable the coal to compete with the river coal, and no such condition affected its transportation to Lebanon.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

5 Q. When did the southeastern Kentucky coal mines begin shipping coal to Louisville, and under what circumstances, and under what arrangement as to transportation, and what has been the effect of that arrangement?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The first coal mines in southeastern Kentucky were on the Knoxville branch of the L. & N., at Livingston, then on the extension of the branch to Jellico. Mines were opened in Laurel and Whitley counties and at Jellico, in Tennessee, and when the Cumberland Valley branch was built mines were opened in Knox and Bell counties. The southeastern Kentucky mines first began to ship coal to Louisville in large quantities about 1883, and this shipping could only be done by the coal operators by their first getting a re-
duced rate, so as to enable them to compete with the then
142 existing river rates, the effect of which—I mean the *the* reduced rates of transportation—stimulated the coal output, the opening of mines, and development of coal lands. Prior to the extension of the Knoxville branch from Livingston to Jellico there were some small mines at Livingston and Pine Hill, whose output was mostly consumed by the local demand at interior Kentucky points. It was not until a market was opened in Louisville by reduced railroad rates that the operators from southeastern Kentucky were assured of a dumping ground for their surplus output. The output at the mines has greatly increased in the last few years, owing to the Louisville market being secured by reduced rates. This has led to the employment of many more miners and given them more steady employment, with the result that there has been greatly increased demand at the mines for all kinds of provisions and farm products, such as flour, corn, hay, etc., etc., which are largely supplied by such places as Stanford and Lebanon and the country adjacent to them and other points along the line of the Louisville and Nashville railroad between Lebanon and the mines. Moreover, this access to the Louisville market has led to a substantial decrease in the price of coal at Lebanon and other local points.

The court still refused to permit the witness to answer the ques-

tion or to so testify; to which ruling of the court the defendant, by counsel, excepted.

143 6 Q. In 1894 did the southeastern Kentucky coal mines charge the same for coal sold to Lebanon and other places similarly situated that they charged for coal sold to Louisville, and why? Did those mines lose money by selling coal at Louisville at a lower price; and, if not, why could they not have reduced their price to all local points to the Louisville price without losing money? Did the fact of the less charge at Louisville than to the local points injure the local points?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

In 1894 the mines in southeastern Kentucky did not charge the same prices for coal sold in Louisville as for coal sold in Lebanon and other points similarly situated, for the reason that the conditions prevailing and affecting the market in Louisville were not similar to those existing at Lebanon and other points similarly situated. The Louisville market was a dumping ground for surplus product, on account of the mines being able to ship there largely during the dull season, some of the mines usually carrying a large stock there. Prices obtained were very much lower than those prevailing elsewhere, on account of the competition of the river coal.

144 The fact that sales were very much increased in the Louisville market by the reduced price, and the trade would take inferior grades of coal, unsalable at interior points, enabled the mines to sell their coal at a less price than was charged elsewhere, without actual loss. Local points mostly use only the best grades of coal, and a mine to cater to such a demand must find a market for its lower grades. Lower prices already existed in Louisville, and the mines meeting those prices there had no effect on prices at local points, conditions not being the same, there being no competition such as existed at Louisville. Moreover, the price of coal sold to Lebanon or the other local points was not increased by selling the coal at Louisville at a lower price, but, on the contrary, access to the Louisville market tended to decrease the price at which coal was sold at those local markets.

The court still refused to permit the witness to answer the question or to so testify; to which action of the court the defendant, by counsel, excepted.

7 Q. Explain how the cost per ton of producing coal was reduced by the mines having access to the Louisville market.

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The cost per ton of mining coal is actually reduced by
145 reason of the reduced rates to Louisville, and this enables operators to sell to dealers at Lebanon at a less price than if the rate to Louisville were not reduced. By being enabled to ship surplus output to Louisville, coal operators can keep their miners together, keep them at work, improve mining facilities, loading facilities, and take all steps necessary to reduce the cost of the output to the lowest possible price. This could not be done unless the mines had access to the Louisville market at rates to compete with river rates.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

8 Q. Did access to that market enable the mines to dispose of any grades of coal not marketable at local points; if so, what would have become of those grades of coal if access to the Louisville market had been denied?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Certain grades of coal are marketed in Louisville which could not be marketed at interior local points and would be a loss to the operator unless a market like Louisville, requiring large quantities of different grades of coal, could be found.

146 The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

9 Q. In 1894 could the Louisville & Nashville Railroad Company have charged a higher rate from those mines to Louisville than it did charge? What would have been the result if it had been required to charge no higher rates for the transportation of coal from those mines to Lebanon and other intermediate points than to Louisville? What would have been the result if the right to make the less charge to Louisville had been obtainable and revocable at the option of the railroad commission?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for the defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The Louisville and Nashville Railroad Co. could not in 1894 have charged a higher rate than it did charge from those mines to Louisville. If required to charge as much to Louisville as to Lebanon, the mines would have lost the Louisville market. If the right to fix rates were in the hands of railroad commissioners, I, as an operator, would not feel safe in my business, as I would not know what views varying commissioners have. It would put the
147 entire investment in coal mines in *in* Kentucky under the charge of the commission, as the right to get into the Louis.

ville market is indispensable to the prosperity of the Kentucky mines.

I wish to say that the coal operators know their business and calling, and they are always hunting markets and trying to get the lowest possible rates. I am of opinion that rates to Lebanon cannot be reduced to the rates now given coal operators to Louisville. If a change be made so as to adjust matters, rates to Louisville will have to be raised to Lebanon rates. This will ruin the coal operators and place the coal trade in southeastern Kentucky in the hands of the Jellico mines in Tennessee, and drive Kentucky operators into closing their mines. Such is my opinion.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

10 Q. What amount of capital is invested in the southeastern Kentucky coal mines, and how many people are given employment by reason of the operation of those mines?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

148 A very large amount of capital is invested in southeastern Kentucky coal mines and several thousand persons employed and sustained by them.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

11 Q. Does competition in the business of transportation affect the policy or convenience of the carrier only?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

Competition in rate of transportation not only affects the carrier, but also affects the operator and the public generally, as heretofore stated.

The court still refused to permit the witness to so testify or to answer the question; to which ruling of the court the defendant, by counsel, excepted.

12 Q. In what way are the mine operators or coal consumers or the general public concerned with the cost to the carrier of transporting coal?

Objected to by counsel for the Commonwealth. Objection sustained; to which the defendant, by counsel, excepted.

Thereupon counsel for defendant avowed that the witness, if permitted to answer the question, would answer truly as follows:

The mine operators, coal consumers, and general public
149 are concerned with the rates of a railroad company and with the elements determining those rates. Those elements are the various commercial conditions giving rise to different sorts. I do not think the cost to the carriers of transporting coal could be used by the carrier as the basis of its rates, as that is an unknown quantity even to the carriers, there being so many elements involved. It is not, therefore, a matter of any concern to the mine operators, coal consumers, or general public.

The court still refused to permit the witness to answer the question or to so testify; to which ruling of the court the defendant, by counsel, excepted.

Counsel for the Commonwealth declined to cross-examine.

And this was all the testimony offered by either party or heard by the court and jury upon the trial of this cause.

The defendant thereupon moved the court to instruct the jury peremptorily to find for the defendant, on the ground that section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, as construed by the court, are contrary to the Constitution and laws of the United States, and therefore void, in that they operate to deprive the defendant of its property without due process of law, and to deny it the equal protection of the law, contrary to section 1 of article XIV of the amendments to the Constitution of the United States, and to impair the obligation of
150 the defendant's contract with the Commonwealth of Kentucky, contrary to subsection 1 of section 10 of article 1 of the Constitution of the United States, and would operate to regulate commerce among the several States, contrary to subsection 3 of section 8 of article 1 of the Constitution of the United States, and in conflict with the act of Congress of February 4th, 1887, entitled An act to regulate commerce; but the court decided against each and all of said contentions of the defendant, and decided in favor of the validity of said section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes; to which ruling of the court and to each and every part thereof the defendant at the time excepted and still excepts.

Thereupon the Commonwealth moved the court to give to the jury instructions Nos. 1, 2, and 3; to the giving of each of which instructions the defendant objected; but the court overruled the defendant's objections and gave all of said instructions, and to the ruling of the court in giving each of said instructions the defendant excepted and still excepts. Said instructions are as follows:

No. 1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, The Louisville and Nashville Railroad Company, a common carrier and a corporation organized under the laws of this State, operating in this State a line of road extending from Altamont, in this State, through the county of Marion and city of Lebanon, to Louisville, in
151 this State, did, in the county of Marion, within 12 months next before the finding of the indictment herein, to wit, on October 17th, 1894, did transport a car-load of coal from Altamont,

Ky., to Lebanon, Ky., over its said line of road for one J. M. Shreve, and did then and there charge and receive from the said J. M. Shreve, as compensation for the transportation of said car-load of coal, twenty-nine and fourteen one-hundredths dollars ($29.14), being at the rate of one and fifty five one-hundredths dollars ($1.55) per ton, when for the transportation of a similar car-load or car-loads of coal under substantially similar circumstances and conditions for a longer distance over the same line of road, namely, from Altamont, Ky., to Louisville, Ky., and to Elizabethtown, Ky., in the same direction, the distance from Altamont, Ky., to Lebanon, Ky., being shorter and included within the longer distance from Altamont, Ky., to Louisville, Ky., and Elizabethtown, Ky., and that the said defendant at said time did charge or receive less compensation than $1.55 per ton from various persons or from any person at said Louisville, Ky., and Elizabethtown, Ky., the defendant at said time not having been authorized by the railroad commission of this Commonwealth to charge less for a longer than for a shorter distance for the transportation of said coal, they will find the defendant guilty as charged in the indictment and fix the penalty at a fine of not less than $100.00 or more than $500.00.

No. 2. If the jury have a reasonable doubt of the defendant having been proven guilty, they will find the defendant not guilty.

152 No. 3. The jury are instructed that in determining whether two or more car-loads of coal are transported under substantially similar circumstances and conditions when one is transported for a longer distance over the same line of road than for a shorter distance in the same direction, the shorter distance being included within the longer distance, they should consider only such circumstances and conditions as relate to the nature and character of the service performed by the defendant in the actual handling and movement of the coal transported.

The Commonwealth offered no other instructions, and the foregoing are all the instructions asked, given, or refused on the trial.

And the jury having heard the instructions of the court and the argument of counsel, and having retired to consider their verdict, returned into court the following verdict:

"We of the jury find defendant guilty and fix the fine at $300.00."

And judgment having been rendered against the defendant upon said verdict and the defendant having filed its written motion to set aside said verdict and judgment and grant it a new trial herein, together with written grounds for said motion, and the court having overruled the same and an appeal having been granted the defendant to the court of appeals, this bill of

153 exceptions has been tendered in court and has been examined and approved and is hereby made a part of the record.

CHAS. PATTESON,
J. M. Cir. Ct.

Filed in court February 3rd, 1889.

B. J. LANCASTER, *Clerk.*

Supersedeas Bond.

STATE OF KENTUCKY, }
Marion County. }

Marion Circuit Court.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant, }
vs. }
COMMONWEALTH OF KENTUCKY, Appellee. }

Upon appeal from a judgment of this court rendered 25th January, 1899.

In indictment No. 505.

Whereas said appellants have taken an appeal from the judgment of this court rendered on the 25th day of January, 1899, against appellant in favor of the appellee for the sum of ($300.00) and costs, which judgment is in words and figures as follows: It is therefore adjudged by the court that the Commonwealth recover of the defendant the sum of three hundred dollars and its costs herein expended, for which execution may issue, and the appellant desires to supersede said judgment:

Now, we, H. W. Bruce, surety, do hereby covenant to and with the appellee, Commonwealth of Ky., that the appellant will pay to the appellee all costs and damages that shall be adjudged
154 against the appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid, and also pay all damage which during the pendency of the appeal may accrue by reason of the appeal.

Witness our hands this 6th day of Febr'y, 1899.

H. W. BRUCE,
By W. J. LISLE,
Attorney-in-fact.

Attest: B. J. LANCASTER, *Clerk.*

Filed and supersedeas issued 6th day of February, 1899.
B. J. LANCASTER, *Clerk.*

Whereas the Commonwealth of Kentucky has recovered a judgment for three hundred dollars (300.00) and interest and costs against the Louisville and Nashville Railroad Company, at the January term, 1899, of the Marion circuit court, in the action therein of Commonwealth of Kentucky, plaintiff, and The Louisville and Nashville Railroad Company, defendant, # 505; and

Whereas said defendant has prayed an appeal from said judgment to the court of appeals of Kentucky:

I, H. W. Bruce, of the city of Louisville and State of Kentucky,

hereby authorize W. J. Lisle, of the city of Lebanon and county of Marion, as my attorney-in-fact, to execute and sign my name
155 to the necessary appeal and supersedeas bond in behalf of said Louisville & Nashville Railroad Company for the purpose of superseding said judgment pending said appeal.

Witness my hand this 3rd day of February, 1899.

H. W. BRUCE.

Witness:
E. C. TURNER.

Marion Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY. } No. 505. Long and Short Haul.

Copy for defendant for court of appeals, indictment on which this case was tried, all papers filed since then, and all orders of court and bill of exceptions, omitting all papers and pleadings on change of venue herein.

W. J. LISLE,
Att'y L. & N.

Filed with the clerk Feb'y 21st, 1899.

B. J. LANCASTER, *Clerk.*

156 COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO., Defendant. } *sct:*

I, B. J. Lancaster, clerk of the Marion circuit court, hereby certify that the 156 foregoing pages contain a full, true, and complete copy of a record in the Marion circuit court, omitting only a motion for a change of venue and such pleadings as were filed and orders made on said motion, in which the Commonwealth of Kentucky is plaintiff and The Louisville and Nashville Railroad Company is defendant, which case is numbered "505," as is shown by the records on file in my office.

Given under my hand this 21st February, 1899.

B. J. LANCASTER,
Clerk Marion Circuit Court.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH, Appellee. }

Judgment appealed from rendered at January term, 1899, of Marion circuit court and copied on pages 13 and 17 of transcript. Appeal granted below.

H. W. BRUCE,
WALKER D. HINES,
For Appellant.

157 At a court of appeals held in and for the Commonwealth of Kentucky, at the capital, in Frankfort, on the 24th day of March, 1899, the following order was entered:

"Marion Circuit Court.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee. } (# 505.)

On motion of appellant and by consent of the parties, by counsel, this cause is ordered to be set for oral argument on April 18, 1899."

Afterwards, on the 18th day of April, 1899, the following order was entered of record herein:

"This cause, coming on to be heard, was argued by W. D. Hines, for appellant, by W. S. Pryor, for mine-owners, and by H. W. Rives, for appellee, and laid over for further argument."

Afterwards, on the 19th day of April, 1899, the following order was entered of record herein:

"This cause, coming on for further hearing, was argued by Wm. Lindsay, for appellant, and is submitted."

158 And afterwards, on the 20th day of May, A. D. 1899, the following judgment was entered herein:

"LOUISVILLE AND NASHVILLE Railroad Company, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee. } (# 505.) Appeal from Marion Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of appellant ten per cent. damages on the amount of the judgment herein superseded, which is ordered to be certified to said court, the whole court considering the case. Judges Burnam and Du Relle dissenting.

It is further considered that the appellee recover of appellant its cost herein expended."

On the same day the court, through Judge Hobson, delivered the following opinion herein, which is as follows:

159 "Kentucky Court of Appeals.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Opinion of the Court by Judge Hobson.

Section 218 of the constitution is as follows:

'It shall be unlawful for any person, or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this State to receive as great compensation for a shorter as for a longer distance: Provided, that upon application to the railroad commission such common carrier, or person, or corporation owning or operating a railroad in this State, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section.'

To carry the above into effect the General Assembly enacted the following statute:

160 'If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier, so violating, runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order, the railroad

or common carrier shall not be prosecuted or fined on account of the complaint made.

'If the commission after investigation, fails to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any
161 county, the circuit court of which has jurisdiction, in order that the railroad or common carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or common carrier is indicted and prosecuted.'

(Kentucky Statutes, section 820.)

Appellant transported coal from Altamont to Louisville at $1.00 per ton, and to Elizabethtown at $1.30 per ton, while it charged $1.55 per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter and made an order in writing declining to exonerate appellant from the operation of the provisions of the section above quoted, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecutes this appeal to reverse the judgment imposing a fine upon it of $300.

Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with the western Kentucky coal brought there by the Illinois Central railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to non-competitive points like Lebanon were reasonable and were unaffected by the reduction referred to, which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of section — of the constitution above quoted.
162 It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another, and we are referred to numerous decisions of the Federal courts so holding. On the other hand, it is contended for the State that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

The precise question thus presented was determined by this court in the case of Louisville & Nashville Railroad *vs.* Commonwealth, 20 Ky. Law Reporter, 1380, where the construction of the section adopted by appellee was sustained. We are urged to overrule that

case; but it was fully considered and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation.

It is insisted for appellant that this construction of the section makes it an arbitrary interference with the right of appellant to engage in competitive traffic, depriving it of its property without due process of law, denying it the equal protection of the law, impairing the obligation of its charter contract, and unlawfully interfering with interstate commerce. All of these objections may be considered together.

A railroad is only an improved modern highway. It must of necessity be subject to public control like its predecessor, the turnpike, for the industry and commerce of the country are dependent upon it. To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable is to put in their hands a power dangerous to the welfare of the community and utterly out of keeping with the doctrine that they are
163 public agencies, and so have the right to appropriate to their use the property of the citizen against his consent, upon making him just compensation.

It has been notorious that railroad managers have by discriminations in favor of certain shippers or a given locality brought ruin to others. It was the aim of the constitution to require the railroads in the State to treat all localities fairly and with equality; but as differences of conditions ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul, under like circumstances and conditions, with full power, in special case, 'from time to time, (to) prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State may be relieved from the operations of this section.' It is not confined in its power to each shipment as it may be made, but may prescribe from time to time a suspension of the section on freight of a given character between given points as the public interest and the ends of justice may require.

We are unable to see that as yet any right of appellant has been invaded or that it has any just cause of complaint. If it be true that the public interests require the discrimination in rates shown in this case, and that no injustice has really been done, it may be that upon presentation of the facts to the railroad commission it would allow the rates to stand and make an order exonerating appellant from the operation of the section.

It does not appear that appellant had presented its case to the railroad commission, and we infer that it has not done so from the fact that this case seems to have been specially prepared to
164 present these questions here, and there is no reference to a similar effort before the railroad commission. Although the commission refused to exonerate appellant on the evidence it had

before it, it does not follow that it would still refuse to do so if proper evidence was offered. It represents the whole State, including the railroad and its stockholders, as well as other people, and has always shown a laudable zeal for the interest of the entire State. The power to determine this matter must be vested somewhere, and the constitution having created a special tribunal for this purpose, we cannot see that its provisions are subject to any of the objections raised by appellant.

If the railroad companies are not to be allowed to have exclusive control over the rates for the long and short haul and the sole right to determine when competition exists and to what extent special rates for this reason may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood self-interests have warped and controlled human judgment.

However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve, and no principle of constitutional law is violated when the State, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others.

Counsel for appellant, in effect, concede in their brief that the State may prevent unjust discrimination, and that if appellant's rates are judicially determined not to be reasonable it may then be punished.

Their argument, in effect, is that appellant may be pun-
165 ished under the section of the constitution, although its rates are reasonable and the discrimination is made necessary by competition in trade, over which it has no control. This assumes that the railroad commission will allow the interests of the State to suffer from an unjust rule, or that it will do injustice to appellee.

We cannot see that a jury is either better qualified to pass on the reasonableness of a rate than a skilled commission, nor is it by any means sure that a trial by jury would be in practice any more satisfactory to appellee. It is true the commission may make mistakes, but we see no reason for the apprehension that an impartial tribunal will err more to the prejudice of one of the parties to a controversy than that party might himself to the prejudice of the other if the solution of the question were left to him alone. It may be the commission, on the complaint referred to, from the evidence before it, concluded that the rate to Louisville was as large as it should be to afford a fair competition for the haul to Lebanon, or that the competition with another railroad in the State did not justify the discrimination in favor of Elizabethtown. If it erred in any of its conclusions it has power, from time to time, on further evidence and a fuller hearing, to make such orders as the ends of justice may require, and if the State may control the matter at all we cannot see that the plan proposed is unfair or in excess of the rightful police power of the State.

It is urged that this construction of the constitution will allow coal and other freights from without the State to be shipped cheaper

than they can be hauled to the same point if shipped within the State, as under the interstate-commerce act competition is held to exclude the carrier from the long and short haul clause.

166 The constitutional convention, no doubt, had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty and, no doubt, will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State and the true interests of the Commonwealth as a whole shall be promoted.

The interstate-commerce act, under the construction that has been given it, has proved a sore disappointment to many of its friends. The subject is new. That act was an experiment; the provision of our constitution is an experiment in another direction.

The subject is one of great difficulty, and if experience does not find our provision to bring just results it may lead to that system which will do justice to all and bring these intricate questions to a just and fair settlement.

Judgment affirmed.

Judges Du Relle and Burnam dissent."

And afterwards, on the 23rd day of May, 1899, the following order was entered of record therein, viz:

"Came appellant, by counsel, and on motion the issuing of mandate therein is suspended thirty days."

And afterwards, on the 17th day of June, 1899, the following order was entered of record herein, viz:

"Chief Justice Hazelrigg noted his dissent to the opinion herein, and delivered a dissenting opinion herein, in which Judges Du Relle and Burnam concur."

Said dissenting opinion is as follows, viz:

167 "It is not disputed that at the time of the incorporation of the long and short haul clause of the act of Congress into the Kentucky constitution of 1891 the settled construction of that clause by the tribunal charged with its enforcement, as well as the construction of the same clause by the Federal courts theretofore called on to construe it, was the same as was subsequently adopted by the Supreme Court of the United States.

When this court, therefore, came to construe the clause, it had before it the decision of the question at issue by the Supreme Court of the United States and the decisions of numerous other Federal courts, all agreeing that competition was a controlling factor in the adjustment and regulation of rates, and that its presence and influence conspired to make the 'circumstances and conditions' of shipments substantially dissimilar from shipments where such competition did not exist.

I insisted then, as I do now, that it ought to have been assumed as indisputable that when the framers of the constitution took the pains to copy the Federal law on the subject involved they expected

the same construction to be put on the borrowed language as had theretofore been put on the law from which they borrowed.

Indeed, the ordinary rules of construction required the adoption of the views of those courts which had already construed the law when we incorporated it into our law.

This court has again and again announced the principle that by borrowing the law from a given source we borrow its construction as well. Instead of departing from this settled rule there are controlling and peculiar reasons affecting the regulation of common carriers why the principle adverted to should be adhered to.

168 The carriers to whom the law was to be applied were, in the main, interstate carriers, and were making their shipments into and out of the State under traffic rates adopted to meet the construction of the long and short haul clause by the Federal courts.

Our law-makers must have foreseen that the same law should control all classes of shipments, else there was danger of gross discrimination against the interests of our own people. Concretely put, the question before them was, shall the mine-owners of Jellico, Tennessee, have access to the trade centers of the State of Kentucky at the cheap competition rate, whilst the output of mines at Jellico, Kentucky, a few hundred yards off, shall be limited to the local demand and be shut out of the larger market because of the higher and non-competitive rates?

The answer was such as it ought to have been.

The law-makers agreed to adopt even the ambiguous and awkward phraseology of the Federal—the interstate—law, to the end that whatever might be the construction of the law, at least, it must, according to well-settled rules, be the same construction whether applied by the State or by the Federal tribunals.

I venture to say that it never entered the mind of our law-makers that this law would receive a construction radically different from the construction put on it by the Federal courts, and certainly not if this different construction must result to the disadvantage of intrastate traffic.

It is not amiss to say here that a departure from this well-settled rule has already inflicted irreparable loss on the coal interests of the State in the locality where the question has arisen, and the construction will continue to embarrass and delay development of the great forests and mines of eastern and southeastern Ken-

169. tucky. Aside from all this, there is a more serious question involved.

Under the law as construed by the majority opinion the company must:

1. Increase its rates from the Kentucky mines to Louisville beyond the rates fixed to Lebanon; or

2. Decrease the rates from the mines to Lebanon below those charged to Louisville; or

3. Depend on the arbitrary will of the railroad commissioners to adjust the rates as to them may seem proper.

If the first alternative is forced on the company the result is a

prohibition of the carriage of coal from the mines to Louisville, as none could be sold there. This result would be confessedly an unwarrantable interference with the reasonable use of the company's property.

If the second, then the company is forced to furnish the use of its property at a price below that which is reasonable and at rates below those which afford a fair and just return on the capital invested.

This is true because it is to be assumed that the rates from the mines to Lebanon are already reasonable and just.

The proof offered is conclusive on this point.

The only remaining refuge of the company is to submit its management to the arbitrary will of the commissioners.

And this, say this court, in effect, is better than to leave the matter at issue to a jury.

I think the court overlooks the fact that a jury must act within the rules of law. A trial before a jury is had under the ordinary forms of law. The judge and jury are at least controlled and bound by legal principles and precedents. I think, in the
170 first place, neither Congress nor the constitutional convention ever intended to vest these respective boards of commissioners with such extraordinary and arbitrary power; and, in the second place, I think the law so construed would result in an unwarrantable interference with the reasonable use of the appellant's property and to an extent not permissible under either the State or Federal Constitutions.

In the recent case of The Lake Shore and Michigan S. R'y Co. *v.* Smith, 19 Sup. Ct. Rep., 565 (April 17, 1899), the principle is emphasized that the power of the State in the matter of regulating railroads is to be exercised in subordination to the Federal Constitution, and that railway companies have a constitutional right to manage their own properties subject only to the exercise by the State of a reasonable supervision.

To say that as yet the company is not hurt because the commission will 'do right' is but begging the question. Such a construction results in the substitution of a tribunal to try the property rights of the company which is restricted by no legal safeguards.

The statute so construed is clearly in conflict with the Constitution of the United States. In C., M. and St. P. R'y Co. *v.* Minnesota, 134 U. S., 418, the Supreme Court said: 'This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that so construed it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a
171 matter in controversy, and substitutes therefor as an absolute finality the action of a railroad commission, which, in view of the powers conceded to it by the court, cannot be regarded

as clothed with judicial functions or possessing the machinery of a court of justice.'

Without elaboration, I respectfully dissent from the opinion of the majority and refer to the former dissenting opinion in the same matter as indicating my view in detail of the real meaning and purpose of the statute.

Judges Du Relle and Burnam concur."

On the 28th day of June, 1899, the appellant and plaintiff in error filed in the office of the clerk of the court of appeals its writ of error (a copy of which remains on file in said clerk's office), as follows:

172 UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the court of appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Louisville & Nashville Railroad Company, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a statute or constitution of or an authority exercised under said State of Kentucky, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution (or of a statute) of the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution (or statute), a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States *shall* be done.

Seal 6th Circuit Court Ky. Dis., U. S. of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of June, in the year of our Lord one thousand eight

hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

THOS. SPEED,
Clerk of the Circuit Court of the United States
for the District of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] 1899, June 28, filed. Att.: S. J. Shackelford, C. C. A.

173 On the same day, to wit, June 28, 1899, the plaintiff in error filed in said clerk's office its bonds, together with the power of attorney, as follows:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Know all men by these presents that the Louisville & Nashville Railroad Company, principal, and J. M. Atherton, surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of $1,000.00, to be paid to the obligee herein; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 28th day of June, 1899.

Whereas the above-named Louisville & Nashville Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company shall prose-
174 cute its said writ of error to effect, and, if it shall fail to make good its plea, answer the whole amount of the judgment therein, including just damages for delay and all costs and interest, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, [L. S.]
By WALKER D. HINES, *Attorney.*
J. M. ATHERTON, [L. S.]
By WALKER D. HINES, [L. S.]
Attorney-in-fact.

Sealed and delivered in the presence of and approved by—
J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Ky.

Court of Appeals of Kentucky.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Whereas the above-named Louisville & Nashville Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the court of appeals of Kentucky:

Now, therefore, know all men by these presents that, in order to supersede the said judgment pending said prosecution and determination of said writ of error, I, J. M. Atherton, do hereby appoint and constitute Walker D. Hines as my attorney-in-fact to
175 sign my name as surety to the necessary bond to the Commonwealth of Kentucky in the sum of one thousand dollars ($1,000), conditioned that if the Louisville & Nashville Railroad Company shall prosecute its said writ of error to effect, and, if it shall fail to make good its plea, shall answer the whole amount of the judgment therein, including just damages for delay and all costs and interest, then said bond is to be void; otherwise the same shall be and remain in full force and effect.

Witness my hand and seal the 16th day of June, 1899.

J. M. ATHERTON. [L. S.]

Witness:
J. H. ELLIS.

On the same day, to wit, June 28, 1899, the plaintiff in error filed its assignment of errors in said clerk's office as follows:

176 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.
} Assignment of Errors.

The Louisville & Nashville Railroad Company, plaintiff in error in the above-entitled cause, complains of the judgment rendered therein by the court of appeals of Kentucky, and for error therein assigns the following:

First. The court erred in affirming the judgment of the Marion circuit court, whereas it should have reversed the same, with directions to grant the plaintiff in error herein a new trial, whereon said plaintiff in error could make the defense under the Constitution and laws of the United States, which were set up by it in the record herein, but which were excluded by the court.

Second. The court having held in substance and effect that section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes absolutely and arbitrarily prohibit a railroad company or other common carrier in Kentucky charging more for

the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, under any circumstances whatever, except where the cost to the carrier of the longer haul may be actually less than the cost to the carrier
177 of the shorter haul, saving only an arbitrary power in the railroad commission to permit less charge for such longer hauls in special cases, the action of the commission being final and conclusive and without power of judicial review, erred in holding that neither of said sections, so construed, is repugnant to section 1 of article XIV of the amendments to the Constitution of the United States, in that each of them so construed in effect deprives the carrier of his property without due process of law, and denies to it the equal protection of the law.

Third. The court having held in substance and effect that said section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes absolutely and arbitrarily prohibit railroad companies or other common carriers in Kentucky charging more for the transportation of passengers or property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, although said charge for the shorter distance may be just and reasonable, and on precisely the same basis as the charges for the hauls not happening to be on the line of the given long haul, and without requiring any reduction in the rates for such other hauls below the legal maxima already allowed by law, thereby unreasonably discriminating in favor of the shorter distance of such long haul, and against similar distances not happening to be on that long haul, erred in holding that neither of said sections so construed is repugnant to the Constitution of the United States, although, so construed, they
178 are and each of them is necessarily repugnant and in conflict with section 1 of article XIV of the amendments to the Constitution of the United States, in that each of them in effect deprives the carrier of its property without due process of law, and denies to it the equal protection of the law.

Fourth. The court having construed said section 218 of the constitution of Kentucky and said section 820 of the Kentucky Statutes, as above stated in second and third assignments, erred in holding that neither of said sections so construed is repugnant to subsection 1 of section 10 of article 1 of the Constitution of the United States, in that each of them, so construed, impairs the obligation of the contract between the plaintiff in error and the Commonwealth of Kentucky resulting from the acceptance by said plaintiff in error of the charter granted to it by the Commonwealth of Kentucky, whereby the plaintiff in error had and has a contract right to engage in and receive revenue from all forms of legitimate railroad traffic, subject only to such reasonable regulations as may be imposed by the State in the reasonable and proper exercise of its police power.

Fifth. The court, having construed said section 218 of the constitution and said section 820 of the Kentucky Statutes as above

stated, erred in holding that neither of said sections so con-
179 strued is repugnant to subsection 3 of section 8 of article 1 of the Constitution of the United States and in conflict with and repugnant to the act of Congress of the United States of February 4, 1887, entitled "An act to regulate commerce," in that each of said sections so construed in effect regulates and unlawfully interferes with commerce among the States.

Sixth. The court, having given section 218 of the constitution of Kentucky and section 820 of the Kentucky Statutes a construction making them and each of them repugnant to the aforesaid provisions of the Constitution of the United States and the aforesaid act of the Congress of the United States, erred in holding that said section of the constitution and said section of the Kentucky statutes so construed to be valid, notwithstanding such repugnancy.

Seventh. The court erred in deciding against the title, right, and privilege specially set up and claimed by the plaintiff in error under the aforesaid provisions of the Constitution of the United States, and each of them, and under the aforesaid act of the Congress of the United States.

Eighth. The court erred in rendering the judgment sought to be reversed because it is contrary to the law of the controversy and in opposition to the rights of the said plaintiff in error secured to it by the Constitution and laws of the United States.

Wherefore it prays for a reversal of said judgment.

WILLIAM LINDSAY,
WALKER D. HINES,
For Plaintiff in Error.

180 COMMONWEALTH OF KENTUCKY, *Court of Appeals,* } *set:*

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, hereby certify that the preceding one hundred and seventy-nine pages contain a true and complete transcript of the record and proceedings had in said court of appeals on the appeal of The Louisville and Nashville Railroad Company, appellant, *vs.* The Commonwealth of Kentucky, appellee, together with the original writ of error (a copy of which is on file in my office), a copy of the bond, and assignment of errors; all of which appears of record and on file in my office.

Seal Kentucky Court of Appeals.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 29th day of June, A. D. 1899.

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $55.00.

181 UNITED STATES OF AMERICA:

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Louisville & Nashville Railroad Company is plaintiff in error and The Commonwealth of Kentucky is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Hazelrigg, chief justice of the court of appeals of Kentucky, this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

J. H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

Service of this citation is hereby accepted, June 28, 1899.

COMMONWEALTH OF KENTUCKY,
By W. S. TAYLOR, *Attorney General.*

Endorsed on cover: File No., 17,457. Kentucky court of appeals. Term No., 343. The Louisville & Nashville Railroad Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed July 7th, 1899.

No. 93.

Brief of Lindsay & Bruce for P. E.

FILED
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Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 2, 1900.

No. 93.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM LINDSAY,
WALKER D. HINES,
Counsel for Plaintiff in Error.

H. W. BRUCE,
Of Counsel.

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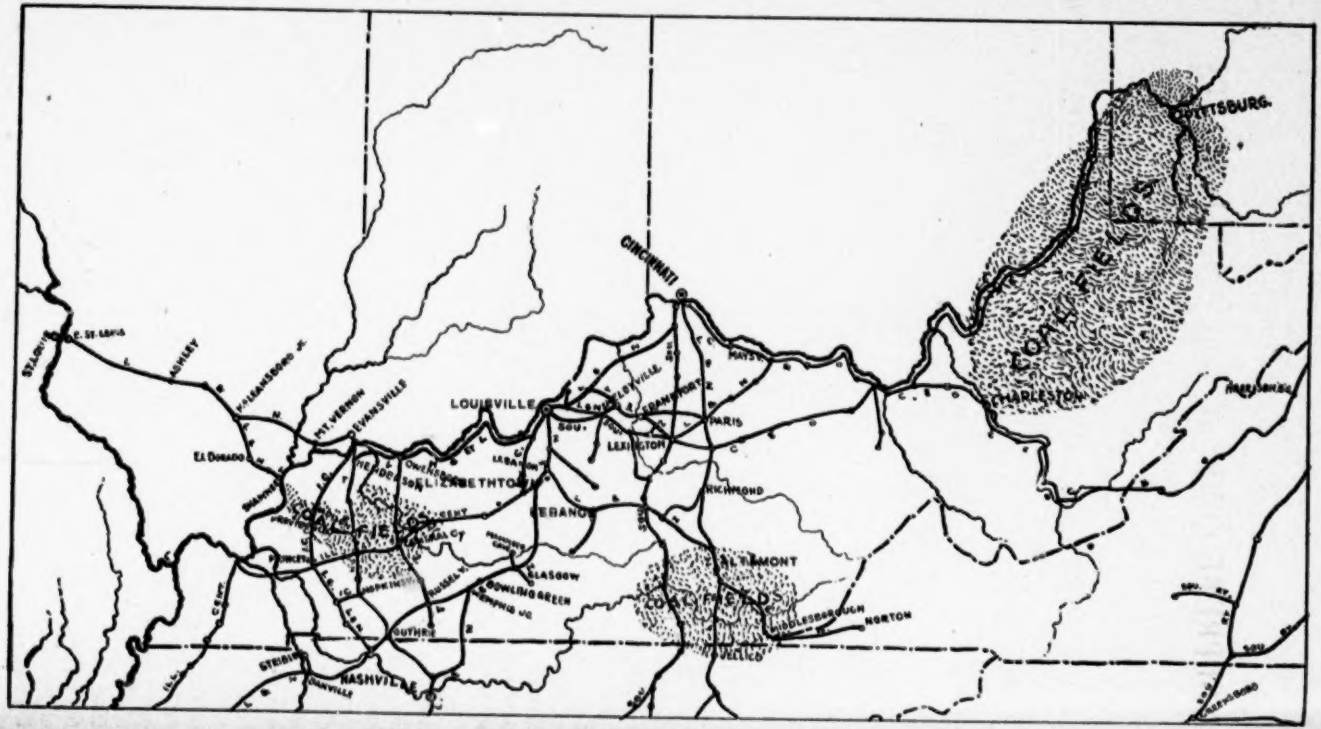
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 93.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR.

versus

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, which will be hereinafter referred to as the Railroad Company, was indicted in the Marion Circuit Court for an alleged violation of Section 820, Ky. Stats., in charging more for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, than to Louisville and Elizabethtown, Kentucky, over railroads which the Railroad Company was operating under the charter granted to it by the State of Kentucky. The attached map shows the relative situation of these places and of other points which are referred to in the record. Section 820, Ky. Stats., is as follows:

"If any person, owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance; such person shall for each offense be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the Railroad Commission, that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Commission to investigate the grounds of complaint; and if, after such investigation, the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the

railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, it shall be the duty of the Commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

This section is based upon Section 218 of the Constitution of Kentucky, which is as follows:

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: Provided, that upon application to the Railroad Commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

On trial of the indictment, a plea of not guilty having been entered, the facts justifying and necessitating the rate adjustment in question were offered in evidence by the railroad company, excluded from the jury by the court, but duly made part of the record, and are briefly as follows:

Louisville originally obtained its coal supply entirely from the Pennsylvania and West Virginia mines, the coal being brought down the Ohio River. When the Louisville & Nashville Railroad was constructed from Louisville to Lebanon Junction, and thence to Lebanon, the latter place was for the first time able to get coal. This coal it obtained from the Pennsylvania and West Virginia mines by way of Louisville, and it had to pay more for coal than Louisville by at least the amount of the freight from Louisville to Lebanon. Subsequently, the Louisville & Nashville Railroad was extended from Lebanon into the southeastern Kentucky coal fields, from which Lebanon

thereafter got its coal. But it still had to pay much more for such coal than Louisville had to pay for Pennsylvania and West Virginia coal, as the rail rate from the southeastern Kentucky coal mines to Lebanon was much more than the river rate from Pennsylvania and West Virginia mines to Louisville, for the Ohio River afforded Louisville the cheapest known means of transportation. Thus Louisville continued to get practically all of its coal by river from Pennsylvania and West Virginia mines, and very much more cheaply than Lebanon could get coal from any place.

In 1883, many years before the adoption of the Kentucky long and short haul law, the Railroad Company established rates from the southeastern Kentucky coal mines to Louisville low enough to enable the coal from those mines to compete with coal reaching Louisville by river, and thereby created a traffic which was valuable to the Railroad Company and to all places or interests involved without working any injury in any direction.

This arrangement gave the mines a market for their surplus, which had theretofore been largely wasted, and permitted much steadier operation than when they had to depend entirely upon the smaller and irregular local demand.

The Railroad Company had to maintain its railroad and equipment, whether it carried coal to Louisville or not, and could well afford to secure this additional traffic at extremely low rates, for even at such rates it would obviously increase its revenue more than it increased its expenses. The right to engage in this traffic was, therefore, of great value to the Railroad Company. Likewise the coal operators had to and did sell their surplus coal in Louisville at much lower prices than they could afford to take for their coal at interior local markets like Lebanon, and yet because what they sold in Louisville was their surplus, produced with but slight, if any, additional cost, it was obviously to their interest to sell it at such prices, and the value of their property would have been materially impaired if they had been denied the right to do so.

This arrangement did not increase the rate to Lebanon, which was and continued to be only a just and reasonable rate for the service performed. On the contrary, Lebanon was decidedly benefited, because the reduction in the cost of mining resulting from the opening of this new market to the Kentucky mines led to a substantial decrease in the price of coal at Lebanon, and the resulting increase in mining operations led to an increase in the demand at the mines for supplies, which was largely supplied by Lebanon and similar local points.

The rate to Louisville was made no lower than was absolutely necessary to meet the competition of the Pennsylvania and West Virginia coal, so that the advantage which Louisville, by reason of its favorable location, already enjoyed over Lebanon was not increased.

In addition to the specific benefit derived by the Railroad Company from the increase of its revenue, due to the traffic thus created, it derived the general benefit which must always result in common to all the interests of the community from any such substantial development of an

important business interest, when it can be done, as it was in this case, without the possibility of any injury to any individual or locality. (Transcript, pp. 25–31.)

The conditions existing at Elizabethtown were similar, though on a much smaller scale, to those existing at Louisville. Elizabethtown, being much nearer to Louisville than Lebanon, was able originally to get Pennsylvania and West Virginia coal cheaper than Lebanon could, and, subsequently, on account of the development of the western Kentucky coal mines, and of its proximity thereto, it got cheaper coal therefrom than Lebanon got from the southeastern Kentucky coal mines. The principles already stated actuated the Railroad Company in carrying coal to Elizabethtown at a low rate to compete with the coal from western Kentucky mines, and the practice was beneficial to all parties concerned, and yet gave Elizabethtown no advantage over Lebanon which it had not theretofore enjoyed. (Transcript, pp. 54–56.)

The Railroad Commission of Kentucky, pursuant to the authority conferred upon it by Section 820, Ky. Stats., investigated the matter and refused to give the relief which it was authorized to give to the Railroad Company, but recommended and procured an indictment.

The record also shows that while in some sections of the United States the density of population and character of railroad traffic may be such as to admit of intermediate rates being reduced to the level of low competitive rates, such is not the case in the State of Kentucky; that in Kentucky, while it is essential to the prosperity of railroad companies that they shall engage in the traffic to competitive points, the rates to non-competitive points can not be reduced to the same low basis. (Transcript, pp. 31–36.)

The railroad company further offered, as is shown by its avowal to that effect, to show that the construction given to the Kentucky long and short haul law by the court would seriously affect the rates on much important interstate traffic, in view of the fact that a directly opposite construction was given to the long and short haul clause of the Interstate Commerce Act, and that in order to avoid the most unjust discrimination between localities in other States and adjoining localities in Kentucky affected by precisely the same conditions, and at the same time avoid the penalties imposed for violation of the Kentucky long and short haul law, the carriers might be forced to alter their interstate rates in many instances, and that thus the Kentucky long and short haul law, so construed, would operate as an unreasonable, injurious, and entirely needless interference with commerce among the States. (Transcript, pp. 36–40.)

The Court gave the jury what amounted to a peremptory instruction to find the Railroad Company guilty. The jury accordingly returned a verdict of guilty, fixing the fine at $300, for which judgment was rendered. The Court having overruled the Railroad Company's motion for a new trial, an appeal was prosecuted by the Railroad Company to the Court of Appeals.

In discussing Section 218 of the Constitution and Section 820, Ky. Stats., we will, for brevity, refer merely to the constitutional pro-

vision, and speak of it simply as "Section 218," it being understood that such reference embraces also the statutory provision, which is merely a copy of the constitutional provision, with the addition of machinery to enforce it.

It was our contention in the Court of Appeals that Section 218, if properly construed, did not prohibit charging more for a short than for a long haul where the short haul rate was the Railroad Company's ordinary standard rate for that distance and just and reasonable in itself, and where the long haul rate was reduced below the short haul rate to meet actual, controlling, and unavoidable competition, was made no lower than was absolutely necessary to meet such competition, and not so low as to entail an actual loss upon the Railroad Company. It is clear that the facts shown in this record bring the case fully within these limitations. We further contended that if Section 218 was so construed as to prohibit engaging in such competitive traffic under such conditions, except in cases where the Railroad Commission in the exercise of purely arbitrary power might consent to it, it would be an arbitrary interference with the Railroad Company's right to engage in legitimate railroad business, which right, subject only to reasonable regulations in the exercise of the police power of the State, is secured to the Railroad Company by those provisions of the Constitution of the United States forbidding any State to deprive any person of liberty or property without due process of law, or to deny to any person the equal protection of the laws; or to pass any law impairing the obligation of contracts, (the Railroad Company having by virtue of its charter a contract right to engage in legitimate railroad business).

We also contended that such construction of Section 218 would make the section void as an unwarrantable interference with interstate commerce for the reasons shown in the record.

The Court of Appeals, by a bare majority (four to three), followed without qualification its opinion in another and earlier case of the same style, L. & N. R. Co. v. Commonwealth, 20 Ky. Law Rep. 1380 (the opinion and dissenting opinion in which are printed as an appendix to this brief), and thus held that Section 218 absolutely prohibited charging more for a short than for a competitive long haul in the case presented by the record, and that in no case could any competition justify charging less for the longer haul than for the shorter haul, except in cases where the Railroad Commission might choose to suspend the constitutional prohibition, and that the power of the Commission was a power with which the court could not interfere, and that it could neither compel nor prohibit action by the Commission. In other words, the court held that Section 218 is an absolute prohibition of engaging in any competitive traffic, at less than the reasonable and necessary standard rates to shorter distance, non-competitive points, except when consented to by the Railroad Commission, and that the Commission's power to suspend the prohibition is absolute and free from judicial review or control.

The Court of Appeals having thus construed Section 218, our contention in this Court is that it erred in upholding and enforcing that

section so construed, notwithstanding its repugnancy to the Constitution of the United States in the particulars above mentioned.

These questions were raised and decided adversely to the rights thus asserted under the Constitution of the United States, both by the Circuit Court and the Court of Appeals. Under the Kentucky practice the Railroad Company could make its defense only under a plea of not guilty. Sec. 172 of the Kentucky Code of Practice in Criminal Cases reads as follows:

"Sec. 172. *Pleas that may be entered.* There are but three kinds of pleas to an indictment:

1. A plea of guilty.
2. Not guilty.
3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty."

Section 175 of that Code is as follows:

"Sec. 175. *Effect of plea of not guilty.* The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending to establish a defense, other than a former conviction or acquittal, may be given in evidence under it."

The Federal questions here relied upon could not, therefore, be set up in any pleading, but the record shows that they were raised and decided adversely by the Circuit Court upon offers to introduce testimony showing the facts above stated, and the Court refused to admit such evidence on the ground that the contentions above set out were not well taken, and distinctly decided against those contentions. The questions were again raised upon motion to instruct the jury to find for the Railroad Company, and again raised in the motion for a new trial, and were each time decided against the Railroad Company.

The questions were thus presented in the record, and were relied upon in the Court of Appeals, and expressly decided by the Court of Appeals adversely to the contention of the Railroad Company. Chief Justice Hazelrigg and Judges Burnam and DuRelle dissented upon the ground that Section 218, as construed by the Court, would result in an unwarrantable interference with the reasonable use of the Railroad Company's property to an extent not permitted under the Federal Constitution, and would, therefore, be clearly in conflict therewith in the particulars urged by the Railroad Company. Their views to this effect are set forth in the dissenting opinion by Chief Justice Hazelrigg.

ARGUMENT.

I.

Ordinarily when this Court is called upon to decide whether a State enactment contravenes the Federal Constitution in a case brought before it on writ of error to the highest State court having jurisdiction, it is confronted by the fact that both the law-making power and the judicial power of the State have reached the conclusion that the enactment in question does not contravene the Federal Constitution. But in this case the construction of Section 218, adopted by four out of seven judges of the Court of Appeals, is so palpably a misconstruction of the language used by the Constitutional Convention that it can in no proper sense be said that we are assailing the action of the Constitutional Convention or questioning its wisdom.

Section 218 is a part of the Constitution framed by the Constitutional Convention at its session ending in April, 1891. It is an exact copy of Section 4 of the Act of Congress of February 4, 1887, known as the Interstate Commerce Act, with only such changes as are necessary to apply the section to transportation in Kentucky instead of interstate transportation.

June 15, 1887, the Interstate Commerce Commission, in an elaborate opinion delivered by Chairman Cooley, held that the prohibition of the fourth section of the Interstate Commerce Act was limited to cases in which the circumstances and conditions were substantially similar, and that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul without any necessity for application to the Commission.

In re L. & N. R. Co., 1 Int. Com. Com., Rep. 31.

This construction had been upheld and acted upon by the Interstate Commerce Commission, and was well known from that time up to the time of the incorporation of that identical provision into the Constitution of Kentucky. It had also at that time received the sanction of the only two Federal courts which had been called upon to construe the section.

Mo. Pac. R'y Co. v. T. & P. R'y Co., 31 Fed. Rep. 862 (decided June 21, 1887).

Ex parte Koehler, 31 Fed. Rep. 315 (decided July 4, 1887).

This construction has since been followed almost uniformly by all the Federal courts, and no other court or tribunal has ever pretended to say that the words "circumstances and conditions" exclude every sort of competition, nor has any such contention ever been made even in any dissenting opinion. This construction had, before the decision of the Court of Appeals of Kentucky, been definitely approved and established by this Court in Int. Com. Com. v. Alabama Midland R'y Co., 168 U. S. 144. It has since been reaffirmed in L. & N. R.

Co. v. Behlmer, 175 U. S. 648. If Section 218 had been similarly construed, we could not contend that it would in any way conflict with the Federal Constitution.

There were at least three distinct grounds upon which, according to elementary rules of construction, it was absolutely clear that the Constitutional Convention intended that Section 218 should have the same meaning.

First. The natural meaning of the words when applied to the subject-matter in the light of the obvious purpose to prevent only unjust discrimination between localities, and in the light of practically the whole jurisprudence, both English and American, upon the subject of competition as affecting the rates of carriers, demanded this construction, and it was fortified by a long line of decisions of the highest authority, concluding with the decision of this Court in the Alabama Midland case, 168 U. S. 144.

Second. The provision was an exact copy of the provision of the Interstate Commerce Act, and if the Constitutional Convention of Kentucky had not intended that the provision should have the same meaning which for four years had been generally understood to attach to the provision of the Interstate Commerce Act, it clearly would not have copied that language.

Third. By copying the provision of the Interstate Commerce Act the Constitutional Convention indicated that it was the policy of the State to apply to intrastate long and short haul traffic exactly the same rule applied to interstate long and short haul traffic.

The Court of Appeals, however, virtually ignored all these grounds. It brushed aside the decisions of this Court in T. & P. R'y Co. v. Int. Com. Com., 162 U. S. 197, and Int. Com. Com. v. Alabama Midland R'y Co., 168 U. S. 144, in which the whole history and philosophy of rate regulations, both in England and America, had been discussed and shown to require the construction which was put upon Sec. 4 of the Interstate Commerce Act, with the brusque comment that "whatever construction that high tribunal may put upon section 4 of that Act, we, in exercise of the province belonging to the Supreme Court of each State to construe its own laws, have endeavored to so construe section 218 as not to kill it."

While ordinarily arguments to show that the State Court erred in matters not subject to review by this Court may be irrelevant here, these comments seem pertinent, because they show so clearly that what we contend is an unconstitutional construction of Section 218 can not be presumed to have had the sanction of the Constitutional Convention. It has, moreover, the least possible sanction from the Court of Appeals, as three of the seven judges dissented, believing that the construction adopted by the majority was not only incorrect, but that it was in conflict with the Federal Constitution.

II.

That enactments established by a State in the exercise of the so-called police power may be examined by this Court and declared void, if in conflict with the Constitution of the United States, is, of course, not open to question.

In Mugler v. Kansas, 123 U. S. 623, 661, the Court said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In Lawton v. Steele, 152 U. S. 133, 136, the Court, after citing various examples of the proper exercise of the police power by the States, said:

"Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. Barbier v. Connolly, 113 U. S. 27; Kidd v. Pearson, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In Lake Shore & Mich. Sou. R. Co. v. Smith, 173 U. S. 684, 699, the Court, although reiterating the well-recognized power of the legislature

"to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public,"

held, that,

"this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated."

Section 218, as construed by the Court of Appeals, either requires the Railroad Company to reduce its rates on coal from the southeastern Kentucky mines to Lebanon and other local points so as not to exceed the low competitive rate to Louisville, which means compelling the Railroad Company to carry its local traffic at substantially reduced rates, to be fixed in an absolutely arbitrary way without any inquiry by any tribunal to determine that the existing rates are unreasonable—and when in fact they are reasonable—or to determine that the lower rates thus forced are reasonable—and when in fact they would be unreasonable—and without any opportunity for the Railroad Company to invoke in any form judicial inquiry or judicial protection in the premises; or it requires the Railroad Company to advance the rate on coal from the southeastern Kentucky mines to Louisville so as to equal the rate to Lebanon, which means the destruction of the coal traffic to Louisville; with the power, however, in the Railroad Commission, which is final and conclusive and beyond any judicial control, to allow the Railroad Company both to enjoy reasonable rates for its local traffic and to retain its competitive traffic in cases where the Commission may choose to grant such permission. The section does not prescribe any rule or condition upon which the Railroad Company may be entitled to obtain from the Railroad Commission the right to enjoy both reasonable rates for local traffic and to continue in the competitive traffic. But the power given the Railroad Commission is to be exercised at its mere will, and, as expressly held by the Court of Appeals, acknowledges neither guidance nor restraint.

Likewise, all carriers must, where long haul competitive traffic is involved, either carry intermediate traffic at abnormally low rates, arbitrarily fixed in the absence of and without the possibility of judicial or other inquiry, or give up perfectly legitimate and valuable competitive traffic, unless the Railroad Commission, in the exercise of its mere will, permits them to continue to enjoy both their competitive traffic and reasonable rates for their non-competitive traffic.

We contend that Section 218 with the meaning thus forced upon it has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undue charges, or the promotion of the safety, health, convenience, or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is, therefore, in conflict with the Fourteenth Amendment of the Constitution of the United States; and since the Railroad Company has built its railroads in the State of Kentucky upon the faith of a charter granted it by the State authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such a construction of Section 218 would impair the obligation of that contract.

III.

Section 218, with the construction given it, could only be justified either as an effort to secure rates in themselves reasonably low to the shorter distance point, or to prevent unjust discrimination between the shorter distance localities and the longer distance localities theretofore enjoying the lower rates.

Such construction of Section 218 can not be regarded as a reasonable or proper attempt to secure reasonably low rates for the shorter hauls. In the first place, it does not secure such rates, but leaves the matter optional with the Railroad Company. But, aside from this, such attempt is open to precisely the same objection which this Court found fatal to the Michigan statute involved in the case of Lake Shore & Michigan Southern R. v. Smith, 173 U. S. 684, which was an act requiring the sale of 1000-mile tickets at a rate less than the ordinary passenger fare, and in which this Court said:

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation."

If the effect of Section 218 is to reduce the short haul rates to the level of the long haul rates, it, too, will make an exception in favor of a particular class in the community, and compel the Railroad Company to carry for the members thereof at a less sum than it would have a right to charge those who were not so fortunate as to be members thereof. Take, for example, a point five miles north of Lebanon Junction towards Louisville and a point five miles south of Lebanon Junction towards Elizabethtown on the Railroad Company's line between Louisville and Elizabethtown. These two points are by railroad exactly the same distance from the coal mines at Altamont, the conditions surrounding them are precisely the same, and they are manifestly entitled to the same coal rates. The rate from Altamont to Louisville via Lebanon Junction is $1.00 per ton, and the rate from Altamont to Elizabethtown via Lebanon Junction is $1.30 per ton. If Section 218 operates to reduce the short haul rates to the level of the long haul rates, it would reduce to $1.00 per ton the rate on coal to the point five miles north of Lebanon Junction on the line to Louisville, while permitting a rate of $1.30 per ton on coal to be maintained to the station five miles south of Lebanon Junction on the line to Elizabethtown, or a still higher rate if the Railroad Company, while retaining its $1.00 rate to Louisville, chose to abandon the competitive $1.30 rate to Elizabethtown and increase its rate to the latter point to its standard rate for that distance. Such examples could be multiplied indefinitely. They show that the section, if it operates to reduce the short haul rates to the level of the long haul rates, would, instead of insuring reasonable rates to the public gener-

ally, bring about the most remarkable and indefensible inequalities between places entitled to exactly the same rates. These examples go to show very strongly what is undoubtedly the fact, that Section 218 was never designed, even by the Court of Appeals, to remedy rates unreasonable in themselves, but was only designed to prevent discrimination between localities.

But the most vital objection to Section 218 regarded as an effort to reduce local non-competitive rates to the basis of long haul competitive rates is that such reduction is essentially arbitrary. It proceeds upon no rule as to what is just and reasonable, and admits of no regulation to secure what is just and reasonable. Very low rates which are forced by controlling an unavoidable competition, and yet which are high enough to increase the carrier's income more than its expenses, can not be regarded as a criterion for non-competitive rates, and to say that all non-competitive rates shall be reduced to the basis of competitive rates, regardless of whether those non-competitive rates are in themselves just and reasonable, is the very essence of arbitrary interference. Ever since the decision of Chicago, &c., R'y Co. v. Minn., 134 U. S. 418, it has been settled that what is a reasonable rate to be charged by a common carrier is a question with respect to which the carrier is entitled to judicial investigation and judicial protection. But no such opportunity of judicial investigation or protection can possibly exist with respect to an enactment which requires either that a carrier shall reduce its local rates to the basis of lower rates for longer hauls enforced by legitimate competition or abandon that legitimate competitive business. If such enactment is valid, then all that is left for the carrier is to make its choice. It must either reduce its local rates, no matter how reasonable, to a substantially lower basis, no matter how unreasonable, and without any investigation or any opportunity to have an investigation of the question of whether its existing rates are unreasonably high or the rates thus forced upon it are unreasonably low, or it must give up its competitive traffic, no matter how valuable to it or beneficial to the public.

Section 218, as construed by the Court of Appeals, can not be upheld as a proper exercise of the police power to prevent unjust discrimination between localities, because it goes too far and prohibits discriminations between localities such as exist in the present case, which are admittedly just and proper and essential to the successful operation of the railroad, and which do not work any injury or injustice in any direction.

That carriers encounter competition of a character which they can rightfully recognize at points where it exists without doing the slightest injury at points where it does not exist, is clearly established. It has been fully recognized by the courts both in England and America. That recognition of such competition is important in many cases to the interests of the carriers, and that in some sections of this country such recognition of it is absolutely essential to their welfare, are facts likewise well established. All these facts appear without dispute in this record, both in a general way and with respect to the coal traffic which is here involved, and for the purposes of this case must be taken as true.

The rate to Lebanon is only the Railroad Company's regular standard rate for that distance, which is not attacked as unreasonable, but on the other hand is admitted to be just and reasonable, and the lower rates to the competitive points are necessitated by controlling unavoidable competition, and are high enough to increase the Railroad Company's revenue more than its expenses, and therefore have no tendency to increase the rate to Lebanon, and do not in any wise increase the advantage which the competitive points would have over Lebanon. Such discrimination is obviously just and proper. The coal traffic to the competitive points is of substantial value to the Railroad Company, and to compel the Railroad Company to withdraw from such traffic would inflict upon it a most serious loss. It is a valuable and legitimate branch of the Railroad Company's traffic, and the State's power to prevent unjust discrimination gives it no power, under such circumstances, to destroy such traffic, for its destruction has no substantial relation to the prevention of unjust discrimination.

Viewed, therefore, either as an effort to cut down the short haul rates to the level of the long haul rates, or as an effort to increase the long haul rates to the level of the short haul rates, and thereby destroy the competitive business, Section 218, as construed by the Court of Appeals, is not a proper exercise of the police power, but is an unwarrantable interference with the constitutional rights of carriers.

In *Ex parte* Koehler, 23 Fed. Rep. 529, a receiver of a railroad, appointed by the United States Circuit Court for the District of Oregon, applied to the Court for instruction as to complying with the Oregon statute regulating railroad rates. One of the sections of the statute prohibited, without any qualification, the charging of more for a short than for a long haul in the same direction, and thus had the same effect as Section 218, as construed by the Court of Appeals, except that the latter gives the Railroad Commission power to grant relief.

In other respects the Court instructed the receiver to comply with the law, but, while pointing out that the right of a corporation to fix its rates was not absolute, and that the legislature might limit the same to what was reasonable, instructed him not to comply with the terms of the long and short haul section of the statute where a less charge for a longer distance was necessitated by competition. The Court said:

"As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation. I assume that the State has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination, it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids any one to so use his property as to injure another, *sic utere tuo ut alienum non laedas*. The provisions of the act that I have condensed in paragraphs 3, 4, and 6, aforesaid, are intended to prevent this practice. But where the discrimination is between places only, and is the result

of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point, unless the latter is allowed to compete for it. But if, to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

"If the Legislature can not require a railway corporation, formed under the laws of the State, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the Act can not be enforced so far as to prevent the railway from competing with the water craft at Corvallis and other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction."

If Section 218 contained no proviso authorizing the Railroad Commission to permit less charges for longer hauls in cases of legitimate competitive as well as other cases, it would, for the reasons stated and on the authorities cited, be clearly in conflict with the Federal Constitution, but that conflict is much intensified by the existence of the proviso, because,

First. The proviso necessarily negatives the idea that the law-making body regarded an excess in the short haul rate over the lower competitive long haul rate as, *per se*, an evil; and,

Second. Even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet where the law does not do so, but recognizes that there may be legitimate traffic which would thereby be interfered with, it is manifestly unconstitutional to entrust the dispensation of the right to engage in such clearly legitimate traffic to a mere administrative tribunal without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give its consent or withhold its consent at its own pleasure and will in any and all cases without judicial review or control. This is precisely the effect of the proviso to Section 218, as construed by the Court of Appeals.

The operation of this proviso brings the case clearly within the doctrine of Yick Wo v. Hopkins, 118 U. S. 356. In that case this Court considered certain ordinances of the Board of Supervisors of San Francisco County, declaring it unlawful for any person to carry on a laundry within the city or county of San Francisco in any building other than one constructed of brick or stone without first obtain-

ing the consent of the Board of Supervisors. After referring to some observations by the Supreme Court of California relative to the ordinances, this Court said:

"That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised under a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

After pointing out that the ordinances involved in Barbier v. Connolly, 113 U. S. 27, and Soon Hing v. Crowley, 113 U. S. 703, simply prescribed reasonable regulations, the Court continued:

"The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is

submitted to the judgment of the officer and calls for the exercise of a discretion of a judicial nature.

. . . . . .

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'May be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

The Court quoted with approval from the case of City of Baltimore v. Radecke, 49 Md. 217, involving the validity of an ordinance, providing that any engine might be removed after six months' notice to that effect from the mayor, wherein the Court of Appeals of Maryland said:

"It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But, if he should not choose to do this, but only to act in particular cases,

there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to every one who gives the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

It is true that in Yick Wo v. Hopkins it appeared that there had been the most unjust discriminations under the ordinance. But the observations above quoted go to show that any enactment conferring such arbitrary powers relative to any lawful employment must in itself be unconstitutional. That case has been followed in numerous cases wherein it has been held that such ordinances are void, *per se*, regardless of whether there had actually been injustice in their administration. See

Ex parte Sing Lee, 96 Cal. 354.
City Sioux Falls v. Kirby, 6 S. D. 62.
City of Richmond v. Dudley, 129 Ind. 112.
State v. Mahner, 43 La. 496.

These principles are illustrated further by the case of Gundling v. Chicago, 177 U. S. 183, which involved the validity of an ordinance in Chicago, providing that when any person desiring to sell cigarettes should make proper application and give evidence that he was a person of good character and reputation, it should be the duty of the mayor, if satisfied that the applicant was of good character and reputation, and a suitable person to be entrusted with the sale of cigarettes, to issue a license upon the filing of the bond. The Court said:

"The case principally relied upon by the plaintiff in error is that of Yick Wo v. Hopkins, 118 U. S. 356, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and

unjust. . . . Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

"'The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies, to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.'

"The ordinance in question here does not grant to the mayor arbitrary power, such as is described in the above-mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be entrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him."

Under Section 218 the Commission is not bound to grant the authority to any applicant, no matter what showing the applicant may make. The Commission may or may not refuse any application. Its power is as clearly arbitrary as was the power of the board of supervisors under the ordinance involved in Yick Wo v. Hopkins.

In Yick Wo v. Hopkins it is stated that rights are secured by the Constitution so that this may be a "government of laws and not of men," but the Court of Appeals declares that Section 218 "prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people and decide when and to what extent a greater charge might be made for a short than for a long haul, with full power" to suspend the section. It is true the Court said the Commission "might" do this "as the public interest and the ends of justice may require," but this Court in the case last cited declined to concur in a much more explicit statement of the Supreme Court of California touching the just principles that should govern the board of supervisors in the execution of the laundry ordinances, and said:

"They seem intended to confer, and actually do confer, not a discretion to be exercised under a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons."

Under Sec. 218, as construed by the Court of Appeals, this arbitrary power over an ordinary and essential branch of railroad business enables the Railroad Commission, without judicial restraint, to dis-

criminate between different carriers or shippers in a way in which the State itself could not discriminate. It would not be competent for the State to permit one railroad company to engage in competitive traffic and to prohibit another, similarly situated, from doing so. Nor could the State authorize one mine to ship its surplus coal to Louisville and withhold such authority from another mine similarly situated. Such acts on the part of the State would work a denial of the equal protection of the laws, which would be in contravention of the Federal Constitution. Yet the Railroad Commission would have full power to do these things free from any control.

Not only the rights of carriers to engage in perfectly legitimate and extremely valuable branches of traffic are thus put absolutely at the will of the Commission, free from guidance or restraint, but the rights of other extensive business interests are put even more completely at the mercy of this tribunal. Especially is this true with respect to coal mines in Kentucky, as their ability to continue in business at all is largely, if not entirely, determined by the ability to get their coal to the Louisville market. The facts offered to be proved by the coal operators who testified below demonstrate very forcibly the absolute dependence of that industry upon the Railroad Commission of Kentucky if this arbitrary power in the premises be confirmed by this Court. (Transcript, pp. 56–76.)

The arbitrary power condemned in Yick Wo v. Hopkins would, of course, have been condemned just as emphatically if it had been conferred by the Constitution of the State instead of by a municipal ordinance, for this Court was bound by the holding of the State court, that the Board passing the ordinance had power under the Constitution of the State to do so. If it had such power, it had just as much power as the Constitutional Convention itself would have had. It may be that the Court will be more reluctant to condemn a provision in Constitution than a provision in a municipal ordinance; but that reluctance will certainly not exist in a case like this, where the Court is not called upon to condemn any thing in the Constitution, but simply a palpable misconstruction, by four out of seven judges, of the provisions of the Constitution.

If competitive traffic, such as is shown by the record in this case, and such as we claim to be legitimate within the limitations above defined as legitimate traffic, is legitimate traffic which railroad companies are entitled to enjoy, subject only to reasonable and just regulations, the mere fact that such traffic is only a part and not the whole of the Railroad Company's traffic gives the State no greater right to impose arbitrary and unjust prohibitions or regulations in regard to it than it would have with respect to the whole traffic of the Railroad Company. In Smyth v. Ames, 169 U. S. 466, this Court quoted with approval from the opinion of the Circuit Court, responding to the suggestion that the total reduction under the act in question would be very small compared with the total business of the Company, as follows:

"The fact that the State of Nebraska can reach only one-twentieth of the total earnings gives it no greater right to make a reduction in respect to that one-twentieth than it would have, had it the power

over the total earnings and attempted in them a like per cent of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent, it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earnings." (p. 543.)

In People v. Gilson, 109 N. Y. 389, the Court of Appeals of New York declared invalid a statute prohibiting the giving of premiums with sales of food. The Court said:

"By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food, and is now almost one of the necessaries of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case; and that while his profits on the same amount of coffee sold would be smaller than if he gave no presents, yet by the growth of his trade his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. . . . It can not be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property by curtailing his power of sale; and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid as plainly violative of the constitutional provision under discussion."

Thus the statute was held void, though the right to give such premiums was a mere incident to a lawful business; but the right to engage in legitimate competitive traffic is much more an essential part of railroad business, at least in the State of Kentucky; it is an equally innocent way of "enlarging the amount of trade," and its prohibition is fully as remote from any legitimate exercise of the police power.

The case of People v. Gilson has been frequently followed, and numerous statutes have accordingly been declared void, not because they absolutely prohibited lawful trades, but simply because they hampered lawful trades by prohibiting, without adequate reason, certain desirable, but by no means essential, incidents of conducting those trades.

Ruhstrat v. People (Ill.), 57 N. E. 41.
State v. Dalton (R. I.), 46 Atl. 234.
Long v. State, 74 Md. 565.

To the same effect are:

City of Chicago v. Netcher (Ill.), 55 N. E. 707.
Ex parte McKenna (Cal.), 58 Pac. 916.

IV.

The opinions of the Court of Appeals give no reasons whatever to justify the arbitrary effect which that court has given to the prohibition of Section 218, or the arbitrary power which it has given the Railroad Commission under the proviso thereto.

The Court announced that such competition as was shown in the record affected the policy or convenience of the carrier only, and that the general public was not concerned with it. If so, it is remarkable that the Constitutional Convention gave the Railroad Commission the power, at its will, to suspend the constitutional prohibition in cases of this character, since no public interest was involved; but the fact is, as recognized by every other court and tribunal dealing with the question, that legitimate competition does affect and concern the public, and that the policy of the carrier is influenced thereby simply because the carrier is bound to recognize what controls the action of the commercial public.

The Court said that Section 218 was adopted because there had been general and unavailing complaint on account of low rates in favor of competitive localities and comparatively excessive compensation at non-competitive localities, and that there was no complaint of discrimination between localities where there was no competition; and, moreover, if there had been, the Court could have prevented it upon common law principles, but that the Court could not, in the absence of statute, prevent discrimination in favor of competitive localities. If the Court had the power to prevent unjust discrimination between two non-competitive localities, it certainly had the same power to prevent unjust discrimination between a non-competitive locality and a competitive locality.

But such complaints, if they existed, could only have been with reference to discriminations supposed to be unjust; and even if just discriminations had been complained of, that could not warrant their prohibition. Whatever justifiable complaint existed would have been fully remedied by giving to Section 218 its proper meaning. The meaning given it by the Court of Appeals can have no reasonable or legitimate relation to the prevention of unjust discrimination between localities.

The Court said also that the actual cost of transportation is not generally greater for the shorter than the longer distance, and that, therefore, less rates to longer distance points are generally unjust and inexcusable extortion. In this the Court shut its eyes to the conditions of railroad transportation, which have been recognized by practically every other tribunal dealing with the subject, and which are, indeed, a matter of common knowledge and understanding, and which, moreover, were affirmatively shown in the record then before it. (Transcript, pp. 41–54.)

These considerations were stated with striking terseness by the Circuit Court of Appeals for the Fifth Circuit in the case of Interstate

Commerce Commission v. W. & A. R. Co., 93 Fed. Rep. 83, as follows:

"If the competition at the longer distance points is real, and such as to affect rates, the carrier must accept those rates, or abandon the competitive traffic. If the competitive rates are something more than the additional cost of the movement of the traffic, it is to the interest of the carrier and to the interest of the public that the carrier should be allowed to compete for the traffic. The profit, however small, to the extent that it inures, increases the revenues of the carrier, and has a tendency to reduce local rates and to improve the local service. There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic, and that remuneration therefor which the competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would doubtless be applied and enforced if the circumstances and conditions permitted it to be done. But, as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it can not be applied to traffic that is subject to severe competitive conditions."

This quotation is simply a reiteration of the principle upon which every Federal Court, including this Court, has proceeded in dealing with questions arising under the long and short haul clauses, and which needs but to be stated to commend itself to the judicial mind.

The Court also suggested that if competition could justify a less charge for the longer haul, Section 218 would be scarcely effectual for any purpose, and that discrimination could continue to be made at the will of the carrier and without legal restraint. This is a manifest and inexplicable misconception. The proper construction of the provision would admit of no such consequence. It would effectually prohibit every instance of unjust discrimination between localities on the same lines, whether made under pretext of competition or otherwise, and at the same time would not prohibit the carrier's engaging in legitimate competitive business when so doing would not be injurious to the public. The prohibition of just discrimination and the consequent destruction of legitimate traffic can not be justified on the plea that such annihilation is necessary to the adequate prevention of unjust discriminations, especially when no such necessity exists.

But after attempting by these various arguments (and we have summarized all adduced by the Court) to show that the public interest demanded that such rates to competitive points should be prohibited, the Court tears down its whole argument by holding that the Constitutional Convention intended that the Railroad Commission might at its

will authorize the less charges which the Court has just tried to show are inconsistent with the public welfare. Clearly, if the Constitutional Convention had so regarded competitive rates, it would not have authorized the Railroad Commission at its will to grant permission to charge them. But not only does the Court thus destroy the reason for the construction which it gives the section, but it destroys the provision itself, for while the Commission is left at large by the section to grant or withhold the favor of less competitive rates simply according to its own will and without judicial control, still, if we assume that the Commission would act fairly and intelligently in the premises, then it must follow that if in one case they authorize the less competitive charge for the longer haul, they must do so in every other case of legitimate competition within the limitations above described, that is, where the local rates are simply the regular standard rates for that distance and not attacked as unreasonable, and where the less competitive rates are compelled by controlling and unavoidable competition, and are not so low as to inflict a loss upon the Railroad Company so that the rates to the local points are not increased, and the competitive point is given no advantage which it would not otherwise have. If the Commission should grant the desired relief in one case of such legitimate competition and refuse it in another, it would be guilty of the most flagrant unjust discrimination, which would be none the less unjust because there is absolutely no remedy for it under the construction adopted by the Court of Appeals. If, on the other hand, the Commission grants the relief in all such cases, then it restores the status which we insist is the legitimate status, and leaves the section prohibiting only what we admit it does and ought to prohibit, and thus destroys what the Court of Appeals says was the very purpose of the law.

The Court insinuated that the construction put by it upon Section 218 must be adopted, as otherwise railroad men alone would be allowed to fix rates, and no tribunal could review their decision; and that under any other construction of the section the rights of the public would be left to be determined by the Railroad Company alone. This assumption is absolutely groundless and extremely unfair. The Court was not asked to hold that the Railroad Company alone should fix rates or determine the rights of the public, or that its actions in those respects should be free from review. Not only was the right of reasonable regulation admitted to the fullest extent, but the very theory upon which the Railroad Company was proceeding necessitated, in every controverted case, the judgment of the Court upon all of the evidence introduced as to whether or not the facts constituted that dissimilarity of circumstances and conditions contemplated by the law; and the Railroad Company could only hope to succeed by satisfying the Court that the rate adjustment did not injure the non-competitive point.

Clearly, none of the Court's reasons tend to show any justification for the arbitrary interference with legitimate railroad business which results from its construction of Section 218.

The Court seemed to assume that the reasonableness of the rate for

the short haul was the paramount consideration, and said that a jury was no better qualified to pass on that question than a skilled commission. This, however, loses entire sight of the principle clearly established by this Court in Chicago, &c., R. Co. v. Minnesota, 134 U. S. 418, and uniformly followed since then, that the Railroad Company is entitled to a judicial determination as to rates prescribed for it by a commission. If in the future the Commission in the exercise of the unlimited power which it will have, under the Court's construction, should impose as the condition of the Railroad Company's engaging in competitive traffic the requirement that it should charge unreasonably low rates to intermediate points, there would be no possible way in which judicial protection could be had. If the Company acquiesce in the condition and reduce its intermediate rates to the unreasonably low basis, that, of course, would end the matter; if it did not acquiesce, it would be compelled to give up the competitive traffic. The Court of Appeals has expressly said that the courts can not control the action of the Commission. Either alternative, therefore, will leave the Railroad Company without any opportunity to invoke judicial protection.

The Court stated that no right of appellant had been invaded, because it had not presented its case to the Railroad Commission, and that if it did so the Commission "might" allow the rates to stand. But the matter had been presented to the Railroad Commission in pursuance of the procedure of Section 820 of the Kentucky Statutes, at least with respect to the Louisville traffic, and the Commission after investigation had not only refused to grant relief, but had taken steps to prosecute the Railroad Company. It is true the Commission intimated that the Railroad Company might be permitted to charge a less rate for the longer haul if it fixed such rate to Lebanon as met with the Commission's approval. The acceptance of this condition, however, would have left the Railroad Company's rates, as heretofore pointed out, absolutely in the control of the Railroad Commission without the possibility in any way of invoking judicial protection if those rates were unreasonably low; and the judicial history of this country shows that it is not unprecedented for railroad commissions to impose unreasonably low rates, even when their action is subject to judicial review and control; here the Railroad Company would either have to take without question such non-competitive rates as the Commission might give it, or give up its valuable competitive traffic.

As is apparent from the language of Section 218, as well as from the decisions of the Court of Appeals, the discretion vested in the Railroad Company is necessarily an arbitrary discretion, without any rule to guide the Commission or protect the carrier, and free from judicial control. If the carrier should apply to the Commission and the application should be refused, and should apply for redress in the courts, it would be a sufficient answer for the Commission to say, as was pointed out by this Court in the case of Yick Wo v. Hopkins, *supra*, that the law had conferred upon them authority to withhold their assent without reason and without responsibility. A refusal to grant relief upon a formal application would, therefore, put the injured

party in no better plight to assert his constitutional rights. The Court would be confined to holding either that the arbitrary power conferred upon the Commission is lawful, and therefore that the injured party is without relief, or that Section 218 is itself void by reason of its conflict with the Federal Constitution; and if void, it can not regulate the conduct of the Railroad Company or sustain the judgment herein.

To hold that there must be first an application to the Commission and a refusal by the Commission, would deprive a carrier of any opportunity to get relief. The carrier must conform to Section 218 until the Commission authorizes it to charge the less rate for the longer haul. If the Commission withholds such permission, then, since the carrier can not by judicial proceedings compel the Commission to act, it must keep on conforming to Section 218, or, in other words, must continue to submit to the Commission's will. It may be suggested that the Railroad Company could, after such refusal of the Commission, establish the lower rate nevertheless, and upon prosecution therefor show its constitutional right to engage in such competitive traffic; but can its right to engage in such competitive traffic be made any more constitutional by the Commission's refusal to allow it? Is not its right just as enforceable in the absence of action by the Commission? It seems absurd to say that a carrier has a right to engage in certain traffic upon certain conditions which the courts will enforce, but that the courts will not enforce it until the Railroad Commission has first condemned it.

The Court has before it here a case of undoubted legitimate competitive traffic which is important to the Railroad Company, and in which it has the right to engage without being arbitrarily compelled to reduce its intermediate rates, which are admittedly just and reasonable for the service performed, to a basis manifestly unreasonable, in the absence of any opportunity for a judicial investigation as to the propriety for such reduction. This right can not be confided to the aribitrary control of the Railroad Commission. The only control given to the Commission is purely arbitrary. To say that a Railroad Company must first invoke this arbitrary and unlawful power upon the part of the Railroad Commission before it can have any standing in court to maintain its constitutional rights, necessarily recognizes the right of control on the part of the Railroad Commission in the exercise of that arbitrary power. If the Commission can not rightfully refuse to grant permission to engage in the traffic in question, then the law would require a vain thing if it required such application. If the carrier has the right to be free from the arbitrary control of the Commission, then that right is violated when it is compelled to apply to the Commission for permission to do that which is in itself lawful.

This competitive traffic was enjoyed by the carriers long before Section 218 was adopted. If the constitutionality of that section can not be invoked until application to and refusal by the Commission, then Section 218 would at least work a destruction of all such competitive traffic during such period as might be necessary to or desired by the

Commission in making up its mind whether it would permit the resumption of such traffic; and, as there is no limit upon the time the Commission may take before deciding upon the application, such destruction might have been continued indefinitely before any opportunity, according to this theory, for the carrier to get the court to restore to it valuable rights thus taken from it.

But a most serious practical objection to requiring the carrier to apply to the Commission, and then, upon the Commission's refusal, to disregard that refusal and establish the lower rate for the longer haul, and upon the prosecution of such violation of the law to assert in court its constitutional rights, is that the penalties are such as to deter any carrier from adopting such a course. These penalties are from $100 to $500 for each shipment. Within a week or a month, and long before an indictment could possibly be tried, to say nothing of the greater length of time necessary to secure a final adjudication, the penalties for observing that rate would amount to hundreds of thousands of dollars. No carrier, therefore, would dare to establish a less rate for a longer haul without the permission of the Commission, for no matter how much it might believe in the righteousnes of its position, it could not be confident in any case that such position would be upheld by the courts. Therefore, for the courts to say to the carrier, "You must apply to the Commission and the Commission must refuse your application before we will give you any relief," is to permit the carrier's legitimate traffic to be destroyed, not only pending action by the Commission, but for all time, since the carrier can not afford to take the risk of raising any question by establishing the less rate regardless of the Commission's action; and, as above suggested, the carrier would logically be in no better position after such refusal by the Commission than it would be before, for after all it must stand or fall by the constitutionality of the section itself, and not by what the Commission may do, as the Commission's action is not subject to review by the courts.

It is true that in this case the question does arise upon an indictment, but that is because no carrier in Kentucky anticipated when the Constitution was adopted that any court would give it such construction as was adopted by the Court of Appeals, and, therefore, it was not thought that in continuing to make the less charge to competitive points under such circumstances as are shown in this record there could be any violation of the law. Unless the section be held unconstitutional in this proceeding, then the result is that all carriers must conform to it as construed by the Court of Appeals. If it can not be declared unconstitutional here, then no case will arise where it can be declared unconstitutional, and the rights of the carriers in Kentucky with respect to this valuable and perfectly legitimate competitive traffic will for all time be absolutely subject to the arbitrary power of the Railroad Commission, and, with respect to that legitimate branch of their business, the carriers of Kentucky will be tenants at will under the Railroad Commission, and this material right, essential to the enjoyment of their property, will be held at the mere will of that tribunal.

V.

Section 218, as construed by the Court of Appeals, is an arbitrary interference with and an unreasonable restriction upon the legitimate business of common carriers. It completely destroys, subject to a purely arbitrary power of salvation in the Railroad Commission, a character of perfectly innocent traffic which is essential to the success of railroads in Kentucky, and a traffic in existence years before Section 218 was adopted.

The interests of the public generally do not require, but will be positively injured by, such interference. The section so construed is not reasonably necessary for the accomplishment of any purpose within the scope of the police power, and it has no reasonable relation to those objects.

The section, therefore, deprives the Railroad Company of its liberty to engage in a material and essential branch of a lawful business, and to use its property therein, and thus deprives it of its liberty and property without due process of law.

In thus interfering in the business of common carriers when all other lawful occupations are free from any unlawful imposition, it injuriously discriminates against common carriers in a way not justified by any principle of classification, and thus denies to them the equal protection of the laws, and it gives to the Railroad Commission arbitrary power and infinite opportunity to discriminate unjustly between different common carriers, without any possible opportunity for redress if the section itself is not held unconstitutional.

The Railroad Company is operating its railroads, which were acquired by it upon the faith of the charter granted by the State of Kentucky authorizing it to engage in railroad business in the State of Kentucky. It, therefore, has a contract right to engage in such business, which necessarily embraces every legitimate branch of that business. If the State can destroy one legitimate branch of that business, it can destroy all branches of it, either one by one or altogether. While admitting to the fullest extent the power of the State to regulate in the reasonable exercise of the police power any business which the State has contracted to permit within its borders, the State certainly has no right to hamper any such business with unreasonable and detrimental restrictions which have no reasonable relation to the accomplishment of any object within the scope of the police power, and Section 218, therefore, with respect to the Railroad Company, impairs the obligation of its contract with the State of Kentucky.

VI.

The State of Kentucky admittedly has no power to place in the hands of its Railroad Commission the control of coal traffic from Jellico, Tennessee, to Louisville, Kentucky, and any enactment having that effect would be obviously void.

By virtue of the anomalous construction given by the Court to Section 218, which is directly contrary to the construction of precisely the same provision in the Interstate Commerce Act, the legitimate traffic to Louisville, Kentucky, from the coal mines in Kentucky, just over the State line from Jellico, Tennessee, is absolutely prohibited except so far as the Railroad Commission of Kentucky may permit its enjoyment. The coal mines in Kentucky and Tennessee being in the same coal field, and affected by precisely the same considerations, are entitled to and have always received the same treatment. To continue giving to coal mines in Tennessee the benefit of the Louisville market as a competitive market, while forced under the State law to close that market to the Kentucky mines, would be disastrous in its effects upon the Kentucky mines, and would give its immediate rivals in the trade an overwhelming advantage; just so far as the railroads might seek to avoid this unjust discrimination by withdrawing the competitive rates to Louisville from the mines in Tennessee, the Kentucky law would become a direct regulation of and serious interference with important interstate traffic, and the future of that traffic would depend absolutely on the action from time to time of the Railroad Commission of Kentucky. In many other instances, likewise, as shown by the record, this remarkable construction of the Kentucky law would tell upon interstate traffic. It would lead to a marked disturbance of the due relation between places in different States, which would be manifestly detrimental to the general welfare. While, if the regulation were a reasonable exercise of the police power respecting purely local concerns, such interference might be regarded as too remote or incidental to make the law obnoxious to the Federal Constitution as an interference with interstate commerce; still, when the regulation is not such a valid exercise of the police power, it seems proper to assign as an additional objection to it that it is an unwarranted interference with and disturbance of interstate transportation and traffic.

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APPENDIX.

Below are the opinion of the Court of Appeals, its response to the petition for re-hearing, and the dissenting opinion of Judges DuRelle and Burnam, in Louisville & Nashville Railroad Company v. Commonwealth of Kentucky, 20 Ky. Law Rep. 1380.

Opinion of the Court by Chief Justice Lewis:

Appellant was in the Marion Circuit Court, upon recommendation of the State Railroad Commission indicted for the offense of charging greater compensation for transporting property for a shorter than for a longer distance, the particular circumstances being thus stated: "The defendant . . . operating a line of railroad in this State, extending from Pittsburgh through said County of Marion and City of Lebanon, on September 8, 1894, . . . did transport a car load of coal from Pittsburgh to Lebanon on said lines for J. M. Shreve, and unlawfully charged and received from him as compensation therefor $40.30, being at the rate of $1.55 per ton, when for transportation of a similar car load of coal under similar circumstances and conditions for a longer distance over the same line of road, namely, from Pittsburgh to Louisville and to Elizabethtown in the same direction, the distance from Pittsburgh to Lebanon being shorter, and included within the longer from Pittsburgh to Louisville, and to Elizabethtown, said defendant at said time did charge and receive less compensation than $1.55 per ton from various persons at Louisville and Elizabethtown, defendant at said time not having been authorized by the Railroad Commission of this Commonwealth to charge less for a longer than for a shorter distance for transportation of coal, etc."

As determination of the question of sufficiency of the indictment, also of other legal questions that arose during trial of this case in the lower court, depend upon construction to be given Sec. 218 of the Constitution and Sec. 820, Kentucky Statutes, they are here copied entire:

Sec. 218. "It shall be unlawful for any person or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind *under substantially similar circumstances and conditions* for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier or person or corporation owning or operating a railroad in this State to receive as great compensation for a shorter as for a longer distance: *Provided*, that upon application to the Railroad Commission such common carrier or person or corporation owning or operating a railroad in this State may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the trans-

portation of passengers or property, and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

Sec. 820. "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind *under substantially similar circumstances and conditions* for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor and fined not less than one hundred, nor more than five hundred, dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on business. Upon complaint made to the Railroad Commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Commission to investigate the grounds of complaint, and if after such investigation the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission after investigation fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order it shall be the duty of the Commission to prescribe a statement of the facts, together with a copy of its order, to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper effort to see that such company or carrier is indicted and prosecuted."

It is made ground of demurrer that Section 820, under which the indictment was found, is inconsistent with Section 218, and therefore invalid, because there is omitted the proviso contained in the latter. But as that proviso is self-executing, and gives to the carrier immediate right to make the application therein mentioned, and to the Commission full power to act upon it when made, iteration of it in the statute was needless. Certainly Section 820 does not at all interfere with the exercise of either the constitutional right of the carrier or constitutional power of the Commission. On the contrary, it contains the additional provision that even without previous application by the carrier the Commission may, after investigation made upon complaint by another of violation of that section, exonerate such carrier from operation of its provisions.

Another ground of demurrer is that the indictment embraces two distinct offenses, "one the charging of a less rate to Louisville than to Lebanon, and the other of charging a less rate to Elizabethtown than to Lebanon."

A statement in the indictment that *greater* compensation in the aggregate was charged and received from J. M. Shreve for transportation of coal from Pittsburgh to Lebanon than was charged and received from various persons for transporting coal from Pittsburgh to Louisville and Elizabethtown would have been more apt; but the statement as made does not vitiate the indictment or involve accusation of more than one offense. Neither Section 218 nor Section 820 was intended to fix or limit the general rate of compensation for transporting persons and property, but specially to inhibit greater or as great compensation in the aggregate for shorter as for longer distances. So, whatever may have been the amount actually charged and received for transportation of coal from Pittsburgh to Louisville and Elizabethtown, the alleged offense was not nor could not be completed until there was charged and received from J. M. Shreve greater compensation for transporting coal from Pittsburgh to Lebanon, which consisted of a single act and involved a single offense.

The criminal code requires an indictment to describe and identify an offense in terms so direct and certain as to apprise the defendant of the accusation on which he is to be tried, and to make the verdict and judgment rendered available as plea in bar of a subsequent prosecution for the same offense. It was therefore necessary in the present indictment, as was done, to designate the person to the wrong and injury of whom the alleged offense was committed, and to state that the recited amount of compensation charged and received from him, on or about a specified date, for transportation of coal the described shorter distance was greater in the aggregate than the amount then being charged and received from various or divers persons for transportation of same kind and quantity of coal the described longer distance.

But it was not necessary to state the precise amount charged and received for such longer distance, because the fact it was exceeded by or was less than the specified amount charged and received in the particular instance for the shorter distance had been already sufficiently alleged. Nor was it necessary to designate any particular person or persons, probably numerous, than whom Shreve had been charged and required to pay greater compensation; for Section 218 was intended to prevent discrimination rather between localities than between persons. So in order to convict of an offense like the present, it suffices to state in the indictment that the specified amount charged or received for the shorter distance was greater than that charged or received from persons generally or usually for the longer distance, and to support the allegation by the carriers' published schedule of rates, or other competent evidence of the fact.

There was also a motion made in the lower court to set aside the indictment because it does not contain a statement the Railroad Commission, after investigation of the complaint that Section 820 had

been violated by appellant, made the required order refusing to exonerate it from operation of its provisions. Assuming for the present that such investigation, and order following it, must in every case precede an indictment under that section, we think the allegation made on the subject sufficient; and consequently the motion was properly overruled.

The facts stated in the indictment as constituting the offense charged were on the trial proved or admitted. But all testimony offered for the purpose of showing existence of competition at Louisville and Elizabethtown between carriers of coal, or other facts affording reason or excuse, irrespective of cost of service, for charging or receiving greater compensation in the aggregate for the shorter than longer distance over appellant's road, was excluded; and all instructions to the jury hypothecated upon such facts were refused.

The following instruction showing the construction put upon Section 218 by the lower court was given: "That in determining whether two or more car loads of coal are transported under substantially similar circumstances and conditions where one is transported for a longer distance over the same line of road than for a shorter distance in the same direction, the shorter distance being included within the longer distance, they (the jury) should consider such circumstances and conditions as relate to the nature and character of the service by the defendant in the actual handling and movement of the coal transported."

Section 218, as will be observed, does not prohibit less *proportional* compensation being charged or received for the longer than shorter distance, but makes it an offense to charge or receive under substantially similar circumstances and conditions greater compensation *in the aggregate* for the shorter than for the longer distance.

It is proper here to consider the following part of that section: "But this shall not be construed as authorizing any common carrier, or person or corporation owning or operating a railroad in this State, to receive as great compensation for shorter as for a longer distance."

That particular provision, we think, was not intended to neutralize, nor could very materially affect what precedes it, for the difference between *greater* or *as great* compensation charged or received for transportation would ordinarily be too minute for calculation.

The main inquiry in this case is whether the words "substantially similar circumstances and conditions" were intended to relate to the actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying passengers and loading, moving and unloading freight trains, or to competition at particular places in the business of transportation, or other conditions affecting policy or convenience of the carrier only.

If attention be given alone to grammatical construction of Sec. 218, the words in question might possibly be made apply in either or all the conditions mentioned. But, attending to the sense of that section, which in character is both remedial and prohibitory or restraining, and manifestly intended to conserve mutuality of rights and duties between parties to the contract of carrying, and prevent wrong by one

to the other, the natural conclusion would be the words were designed to relate exclusively to the cost of service, for with that is the general public as well as the carrier concerned.

And that legislative power exists to so regulate conduct of the business of a railroad corporation, including charges for transportation, as that those dealing with it be not wronged or oppressed, is unquestionable. For the chartered franchise and privileges of such corporation are always and can be granted only in consideration of public service to be rendered, and, of course, upon implied reservation of legislative power to inhibit at any time unjust discrimination between persons and localities.

But as the section seems to be not so plain to counsel as to preclude discussion, we will look to the reason for its adoption, always a sure guide to the meaning of law-makers.

As there existed in neither the former Constitution, nor statutes enacted under it, any provision of the character, scope, or purpose of Section 218, it was obviously adopted to prevent continuance of what was deemed a wrong hitherto committed with impunity by reason of a defect of the law. Therefore, nature of that wrong being ascertained, as may be readily done by recurring to facts of common occurrence and too widely known to escape judicial notice, that interpretation should be given which will "most surely advance the remedy and suppress the mischief."

For many years prior to adoption of the present Constitution there had been general and unavailing complaint of discrimination by railroad companies of this State respecting compensation charged and received, in favor of localities where existed competition in the business of transportation, and of comparatively excessive compensation being exacted at localities where, because there was not such competition, shippers were at the mercy of the carriers.

But it was argued substantially then, as here and now, that competition made such difference of circumstances and conditions as justified the discrimination complained of.

The legislature did not attempt to give relief. The Court, in absence of an express statute on the subject, and as long as the amount of compensation charged or received was within the charter limit, could not intervene to prevent a railroad company adopting, as matter of assumed business policy, rates to meet competition.

There was no complaint of discrimination between places on the same line of railroad where there was not competition. And if there had been, the Court was, upon common-law principles applicable to common carriers, empowered to prevent it, because such discrimination would have been wanton and without excuse of business policy or necessity.

It is thus made manifest the object of Section 218 was to remedy a defect of the law by thereafter disallowing competition, or other considerations affecting the carrier only, not the general public, as excuse for charging or receiving greater compensation in the aggregate for transporting persons or property in this State the shorter than longer distance. And it is based upon two propositions: First, that the

actual cost of transportation is not generally greater for the shorter than longer distance; therefore to charge and receive greater compensation in the aggregate for the former than latter is unfair and oppressive. Second, that it is contrary to usual business methods, and not to be assumed a Railroad Company would, even under stress of competition, reduce rates of compensation for transportation to and from competitive points so low as not to leave a reasonable margin of profit; therefore an excess of aggregate compensation for transportation to and from non-competitive points is generally an unjust and inexcusable extortion.

So if competition be held to constitute in meaning of Section 218 the real difference of "circumstances and conditions," the section, though deemed of such urgent importance as to be made part of the organic law, would be scarcely effectual for any purpose whatever; for there could not be an approach to similarity, but necessarily a complete *dissimilarity* of circumstances and conditions of the transportation of persons and property the longer distance, nearly always to and from a place where there is competition, and the shorter distance, nearly always to and from a place where there is not competition. Consequently discrimination in aggregate compensation between such localities could still be made at will of the carrier and without legal restraint.

It is farther contended that a railroad company should be permitted to vary rates of compensation regardless of cost of service, and even to extent of arbitrary discrimination between localities, in order to develop resources of the State and at the same time increase its own business.

Due estimate should be put upon advantages to society that have resulted from construction and will continue to result from extension of railroads; and due regard should be had to the rights and interests of carriers as well as of those who patronize them. But such considerations do not justify a wrong interpretation and a consequent defeat of the main purpose of Section 218. After all, the best guaranty of success by the company and benefit to the general public from operation of railroads is to abide by the law as it is and deal fairly, justly, and impartially with persons and localities.

It is true that for well-known reasons there can not be exact similarity of circumstances and conditions as respects proportional cost of transportation the longer and shorter distance, but there is ordinarily a substantial similarity as respects the actual cost. Hence Section 218 prohibits not greater proportional, but greater compensation in the aggregate being charged or received for the shorter than longer distance.

However, framers of the Constitution, aware of the impracticability of fixing unchangeably relative amount of compensation to be charged and received, or rules applicable in every case to the complicated and varying business of railroads, and of the injustice that might sometimes result from doing so, invested the Railroad Commission with power to authorize, in special cases, a railroad company to charge less for the longer than shorter distance; and to prescribe from time

to time the extent to which such company may be relieved from operation of Section 218. And Section 820, enacted in harmony with Section 218, provides that, after an order of the Commission exonerating a railroad company from operation of its provisions as to any special violation complained of, the company shall not be prosecuted on account of it. With such order the court can not interfere. But an order of the Commission refusing to exonerate makes the Company liable to prosecution. And the Court thus acquiring jurisdiction must of course determine proper construction of the two sections; for upon that, the facts being found, depends guilt or innocence in each case.

As already indicated, we think the lower court did not err in giving the instruction referred to, nor in excluding all evidence having no bearing upon the cost of transportation.

Counsel have cited Texas Pacific Railroad v. Interstate Commerce Commission, 162 U. S. 197, and Interstate Commerce Commission v. Alabama Midland Railroad Company recently decided by the Supreme Court of United States, in which construing Sec. 4 of the Interstate Commerce Act, substantially like Sec. 218, it was held that when difference of rates between two points of shipment is the ground of complaint, competition is a leading element to be considered, though in each case the Court was divided. The Interstate Commerce Act was intended to operate not within limits of a State merely, but between and through States. And whatever construction that high tribunal may put upon Section 4 of that act, we, in exercise of the province belonging to the Supreme Court of each State to construe its own laws, have endeavored to so construe Section 218 as not to kill it. And to strengthen the belief we have not misconstrued it; part of the dissenting opinion of Justice Harlan in the last named case is here quoted: "Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies, engaged in interstate commerce, when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I can not believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result."

The judgment is affirmed.

Response of the Court to the petition for rehearing:

Willing to consider all that can be said by those who believe themselves injuriously affected by the opinion in this case, we have, in addition to the petition for rehearing filed by appellant as matter of right, permitted petitions filed in behalf of twenty or more Coal Companies.

It is urged as reason for withdrawal of the opinion that if the Railroad Companies be not permitted to make special rates to competitive points, shipments of coal mined in this State must cease. Though an argument drawn from hardship or inconvenience is usually more appropriately addressed to law-makers, it should, of course, have due weight with the Court in determining the proper construction of a law, meaning of which is doubtful or obscure; but never so much as to induce a construction that is absurd, defeats the evident object in view, or involves stultification of those who made it.

However, the argument in behalf of the Coal Companies, even if based upon entirely correct premise, is counterbalanced by the fact that while special rates to competitive points may benefit a particular industry, removal of all restraint upon discrimination by Railroad Companies might be injurious to other industries and interests connected or identified with non-competitive points.

Conceding the construction we have been, by a sense of duty, constrained to give Section 218 will work injury to the coal industry of this State, the Court is not authorized or permitted to afford relief by perverting the true meaning and thereby defeating the manifest object of the section. The needed relief must be afforded, if at all, according to and in the manner provided by the law itself, which will be hereafter considered.

Counsel for appellant, after stating it had for seven years relied upon construction of the long and short haul law, settled, as they say, by the Interstate Commerce Commission and certain Circuit Courts of the United States, permit themselves to use this language: "The Court of Appeals, now at this late day, *propose* to repudiate that construction and announce a construction which has never been announced by any tribunal with reference to the law from which our law was copied *verbatim*."

Counsel might, without much effort, have recollected that the Court of Appeals does never *propose* but finally *decides* the construction to be given such parts of the Constitution and statutes of this State as need construction; and can not be foreclosed or bound by the views in regard thereto by any other tribunal.

It is not true that framers of the Constitution adopted Section 218 with a view to a construction that had been put upon Section 4 of the Interstate Commerce Act, adverse to the one we have given Section 218. At that time there had been no decision of the question by the Supreme Court of the United States—the only tribunal empowered to construe Section 4 authoritatively and finally. It could, however, be said, if necessary, that prior to adoption of our Constitution it had been held by respectable English courts that cost of service constitutes the difference of circumstances and conditions,

in meaning of their statute on the same subject and similar in terms to Section 218.

The language of Section 218 plainly shows it was made part of the Constitution for the definite purpose of surely inhibiting railroad companies doing something they had previously done at will and discretion; that is, charging and receiving greater compensation in the aggregate for transportation of passengers and property the shorter than longer distance. But if competition at particular localities in the business of transportation, or other circumstances or conditions influencing the common carrier, not affecting the general public, be held by this Court a sufficient reason or excuse for discrimination, railroad companies may, without legal restraint or interference, continue to do precisely what they did before Section 218 was adopted, and it becomes a dead letter.

In order to give meaning and effect to that section, cost of service must be held to alone constitute the difference of circumstances and conditions which will authorize greater aggregate compensation to be charged or received for the shorter than longer distance of the same line of road. And as only to the extent of difference in the actual cost of transportation a difference of aggregate compensation may be rightfully charged or received, the general public as well as the carrier is affected thereby.

As counsel for appellant do not show or attempt to show in what manner Railroad Companies would or could be restrained or prevented from charging at will greater aggregate compensation for the shorter than longer distance, nor what possible purpose Section 218 would or could serve, if the construction they contend for be accepted, we need not consider their petition for rehearing farther.

It is argued by counsel for Coal Companies that the Court has and should exercise jurisdiction to revise an order of the Railroad Commission, refusing an application to authorize a common carrier, in special cases to charge less aggregate compensation for the longer than shorter distance of the same line of road.

Unquestionably framers of the Constitution contemplated probable existence of exceptional circumstances and conditions working hardship or injustice to the Railroad Company as well as particular industries or interests; and therefore recognized the justice and necessity of authorizing special rates to be given to competitive points in special cases. But the Constitution does not contain, nor would it have been practicable to put in it provisions applicable to every state of case that might arise.

The Railroad Commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion the Court has not jurisdiction to either *compel* the Railroad Commission upon application of the common carrier or those interested in particular industries or callings to suspend or relax operation of Sec. 218, or, upon application of individuals or corporations

feeling aggrieved, to *prohibit* such suspension or relaxation in special cases. While the Commission is thus, and to that extent, free from judicial interposition, it can not of course nullify or except in special cases at all suspend operation of Section 218; and though the Railroad Commission be invested with this unusual power, it must be treated as a constitutional power with which the Court can not interfere.

The petition for rehearing is overruled.

Dissenting opinion by Judge DuRelle.

The provisions of law involved in this case are Section 218 of the Constitution and Section 820 of the Kentucky Statutes, as follows:

Constitution, Section 218: "It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance; provided, that, upon application to the Railroad Commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section."

Kentucky Statutes, Section 820: "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the Railroad Commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Commission to investigate the grounds of complaint, and if, after such investigation, the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the rail-

road or common carrier, and the same shall be published as a part of the report of the Commission; and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant, and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order it shall be the duty of the Commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

Without taking time in considering the question whether the statute is in conflict with the constitutional provision in that it makes no provision for application to the Railroad Commission *by the carrier* for authority to charge less for the longer than the shorter haul in special cases, which was the evident intention of the Constitution, but provides only for a complaint *against the carrier* for a violation of the provisions of the statute, or the question whether the indictment is defective, I wish to call attention to the fact that Section 218 of the Constitution is taken almost *verbatim* from Section 4 of the Interstate Commerce Act.

Our Constitutional Convention adopted the long-and-short-haul section at its session closing April 11, 1891. At the time of its adoption into our Constitution that section had been construed by two United States Circuit Courts, and by the Interstate Commerce Commission, it being held that "substantially similar circumstances and conditions" did not mean solely the cost of carriage, but included also real competition, which the carrier might meet by reduction of rates to the competitive point, without making application to the Commission for authority. I attach little importance to the extracts given in the arguments from the Constitutional Convention debates as a means of ascertaining the intent of the provisions adopted; but, in this case, those extracts show that the attention of the Convention was called to the fact that, under the Interstate Commerce Act, a less charge for the longer haul was permitted when there was river competition at the more distant point. Under the well-settled rule of construction, the Convention must be assumed to have had those constructions in mind when they adopted the section. Those constructions have been followed with strict uniformity in this country, to say nothing of the English authorities, the cases adversely decided having been reversed, with an apparent exception in the Social Circle case. That case was decided by the Commission upon the ground, in substance, that there was no competition. The Circuit Court dismissed the bill on the ground that the transportation for the two hauls was not over the same line. The Circuit Court of Appeals reversed the Circuit Court without delivering an opinion, and the Supreme Court (162 U. S.

184) held the decision of the question unnecessary and declined to decide it.

In the case at bar it was shown that there was a substantial difference in the mileage cost of transportation of coal from Pittsburgh, Ky., to Louisville as compared with its transportation to Lebanon, for the reason that the greater volume of traffic in coal and other freight to Louisville made it possible to haul the Louisville freight in through trains, loaded to their full capacity, and without delay, while the traffic to Lebanon, by reason of its smaller volume, was necessarily transported in local trains, which is more expensive. It was shown, also, that the coal destined to Elizabethtown could be handled in the through trains as far as Lebanon Junction, which was the end of a division and only twelve miles from Elizabethtown.

The appellant company was not permitted to prove that the transportation of coal from Pittsburgh and all the mining section of southeastern Kentucky to Louisville was not only affected, but controlled, by competition at the latter point, which did not exist at all at Lebanon. This competition was from West Virginia and Pennsylvania coal, brought in barges down the Ohio to Louisville by the cheapest known method of transportation. The cheapness of its transportation gave Pennsylvania and West Virginia coal control of the Louisville market, and no other coal could be sold there, unless the transportation rates were made so low as to enable it to compete with the coal from those States. Neither the southeastern nor the southwestern Kentucky coal fields could reach the Louisville market at all but for the very low rates of transportation given to Louisville over the Kentucky railroads; and if those rates can not be given, Louisville must depend entirely for coal upon West Virginia and Pennsylvania, or upon the mines of other States, which, under the Interstate Commerce Act, can obtain low through rates to competitive points across this State. No injustice from low through rates to Louisville resulted to Lebanon or other intermediate points, for the rates to those points would have been the same, and the cost of coal probably higher, if the southeastern Kentucky coal could not have been carried to Louisville.

The majority opinion is, in effect, that cost of transportation is the only circumstance or condition that can be considered. If that be so, it is strange that more apt words were not used in the Constitution. The words used are certainly susceptible of a far wider significance. In my view, the section quoted left the railroads in the same condition, and with the same rights, as before its adoption, except in so far as something is expressly forbidden to be done. As said by Judge Jackson (then Circuit Judge) in a case afterward affirmed by the Supreme Court, and twice subsequently quoted with approval (162 U. S., pp. 184 and 197):

"Subject to the two leading prohibitions, that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, *the*

act to regulate commerce leaves common carriers where they were at common law, free to make special contracts looking to the increase of their business; to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits." (Interstate Commerce Commission v. B. & O. R. Co., 43 Fed. Rep. 37.)

In the case of the Mo. Pac. R'y Co. v. T. & P. R'y Co. (31 Fed. Rep. 862), it was said:

"Nor can it well be denied that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions."

In *ex parte* Koehler (31 Fed. Rep. 315), the Court said:

"Freight carried to or from a competitive point is always carried under 'substantially *dis*similar circumstances and conditions' from that carried to or from non-competitive points. In the latter case the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances were altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *ex parte* Koehler, 'abandon the field and let its roads go to rust.'"

In I. C. C. v. A., T. & S. F. R. Co. (50 Fed. Rep. 295), the Court said:

"If the circumstances and conditions are not substantially similar, the prohibition imposed by the statute does not apply at all."

. . . . . .

"The common carrier can not be required to ignore or overcome existing differences in the transportation facilities of different localities, created not by its own arbitrary action, but by nature or by enterprises beyond its control."

In the case of Behlmer v. L. & N. R. Co. *et al.* (71 Fed. Rep. 835), decided by the U. S. Circuit Court for the District of South Carolina, January 22, 1896, the Court quoted from Judge Cooley, *in re* L. & N. R. Co., 1 Interstate Commerce Com. R. 57, as follows:

"The charging or receiving greater compensation for the shorter than for the longer haul is sure to be forbidden only where both are under substantially the same circumstances and conditions. And, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

This is quoted with approbation by the United States Circuit Court, Southern District of California (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 295):

"When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley, in the same case, answers this question:

"'Among other things in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition were to continue. *And water competition was, beyond doubt, especially in view.*

. . . . . .

"The Interstate Commerce Law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."

And see I. C. Com. v. Ala. Mid. R'y Co., 69 F. R. 227, and 74 F. R. 715.

The doctrine of these cases has been followed by the Supreme Court of the United States in the recent case of Interstate Commerce Commission v. Alabama Midland R'y Co., decided November 8, 1897. Said the Court in that case:

"The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission *or the courts* from taking that matter into consideration."

The Supreme Court expressly states the conclusion that in complying with the provisions of the third and *fourth* sections of the act, *competition which affects rates is one of the matters to be considered.*

The Court further holds that where the circumstances and conditions of the long haul and short haul are substantially dissimilar there is no necessity for the railroad company to apply to the Commission for authority to charge less for the long haul than for the short haul.

Of course, whether actual competition exists is a question of fact depending on the matter proved in each case.

It is legitimate to consider a question of State policy as tending to show what was intended by a law, whether a provision of the organic law or a statute. Not that we should decide a case upon what we think the proper policy to pursue; but we may consider the policy which the law-givers had in view as indicating what is the meaning of their enactment. Surely, the framers of our Constitution did not intend to cripple or destroy a growing industry of the State. But the construction by the Supreme Court of the Interstate Commerce Act, which is the same which was given it at the time it was copied into our Constitution, and the construction now given to our Constitution by the majority opinion, directly the reverse of that which prevailed when the instrument was adopted, work together to accomplish that end. Under the law, as laid down by the Supreme Court, it is perfectly lawful for the appellant company,

transporting interstate commerce, in order to meet the Ohio River competition at Louisville, to carry coal from Jellico, Tenn., to Louisville at a lower rate than it charges from Jellico, Tenn., to Lebanon, Ky. Under the majority opinion, it can not carry coal from Jellico, Ky., to Louisville at a less rate than it charges to Lebanon. If, therefore, it be true, as claimed, that the low through rate given to the competitive point is not sufficient to pay the cost of transportation, taking into consideration the fixed charges of the railroad—interest on debt, official salaries, etc., it follows not that the rate to Lebanon and other non-competitive points will be lowered, but that the through rate to the competitive point (Louisville) must be abandoned. The appellant will, therefore, be precluded from transporting Kentucky coal to the greatest market for it, and the mines shipping from Tennessee will have the benefit of Louisville as a market for their surplus, without any competition from Kentucky points. It appears that the Louisville market is almost indispensable to the successful working of the Kentucky mines. Giving access to that market by a through competitive rate works no injury to Lebanon, or to any other non-competitive point, but is a benefit in which Lebanon and other points indirectly share. To deprive the Kentucky mines of that benefit will profit no one except the miners of other States, which will thereby secure a monopoly of the Louisville market.

But without considering the authorities, and without considering what the Constitutional Convention ought to have intended, and doubtless did intend, as a matter of policy, for the interests and industries of the State, the language of the enactment shows beyond question what was the object intended to be effected by this provision of the Constitution, and in what way was that object to be effected. It was made unlawful for the carrier to charge a greater compensation in the aggregate for transportation of passengers or property for a shorter than for a longer haul, over the same line in the same direction, the shorter being included in the longer distance, if such transportation be made under substantially similar circumstances and conditions; but in the prohibition of a greater charge for a shorter distance it was provided that unconditional authority should not be given by implication to make as great a charge for a shorter as for a longer haul. It is, therefore, unlawful to charge as great a compensation for a shorter as for a longer haul, when the shipments are made under substantially similar circumstances and conditions. But even where the shipments are made under substantially similar circumstances and conditions, and where the carrier would, therefore, be confessedly guilty of violating the section if more were charged for the shorter than for the longer haul, on application to the Commission he may be authorized to make less charge for the longer haul, and the Commission may prescribe the extent to which he may be relieved from the operation of the section.

When charged with a violation of the law, the carrier may answer, first, that the shipments were not made under substantially similar circumstances and conditions, but under cir-

cumstances and conditions materially different; or, second, confessing the circumstances and conditions to be substantially similar, the carrier may answer that application has been made to the Commission, and authority given by it to make the less charge for the longer distance. If the circumstances and conditions of shipment are materially dissimilar, the law does not apply at all, and there is no need to be relieved from its operation by the Commission.

In this case the *appellant admits that it has* charged a greater sum for the shorter than the longer haul, but claims that the shipments have not been made under substantially similar circumstances and conditions; and has undertaken to make good its defense, by showing, first, the greater relative cost of the short haul makes a substantial dissimilarity, and, second, by offering to show that, by reason of competition from the Ohio River and from other railroads at Louisville, the shipments to that place have not been made under circumstances and conditions substantially similar to those which apply to a shipment to Lebanon. The testimony as to the cost of carriage is admittedly competent. The question presented here is, whether proof that Louisville is a competitive point and Lebanon is not is competent to show that the circumstances and conditions are dissimilar.

I have said that where the circumstances and conditions are dissimilar, the law, under its own terms, does not apply; but this is to be taken with some modification. Because a less charge is allowable under the act for a longer distance than for a shorter, on account of a less cost, it does not follow that the act loses its application entirely. The proper construction is, that the less rate is allowable only as it is in proportion to the less cost. The cost might be very little less for a longer haul, and yet the charge made be materially less, in which case the act would apply, because the less charge would not be justified by the less cost, and would clearly be the result of an unjust and arbitrary discrimination. And so if it appear that a point is a competitive one, it does not follow from that fact alone that the law is not applicable. It must also appear that the less charge is induced solely by the competition, or by it and the fact that the cost is less; otherwise, under pretense of less cost of shipment and alleged competition, the carrier might charge the less price arbitrarily, and solely because of a desire to favor one locality over another.

When the real purpose of the provision is considered, it seems plain that its enactment was not at all for the purpose of enforcing reasonable rates of transportation, a matter which is provided for by other statutes and by the common law. That is clearly not the purpose of this enactment, because, if the charge in this case had been $1.56 from Pittsburgh to Louisville, the rate from Pittsburgh to Lebanon being $1.55, no one would have dreamed of invoking the aid of the provision under consideration to effect a reduction of the rate to Lebanon; nor could it be invoked if the charges had been $2.00 to Lebanon and $2.10 to Louisville. The enactment, therefore, does not prohibit the carrier imposing any rate it desires, so long as a less rate in the aggregate is not charged for the longer than for the shorter haul. Clearly, the only purpose was to

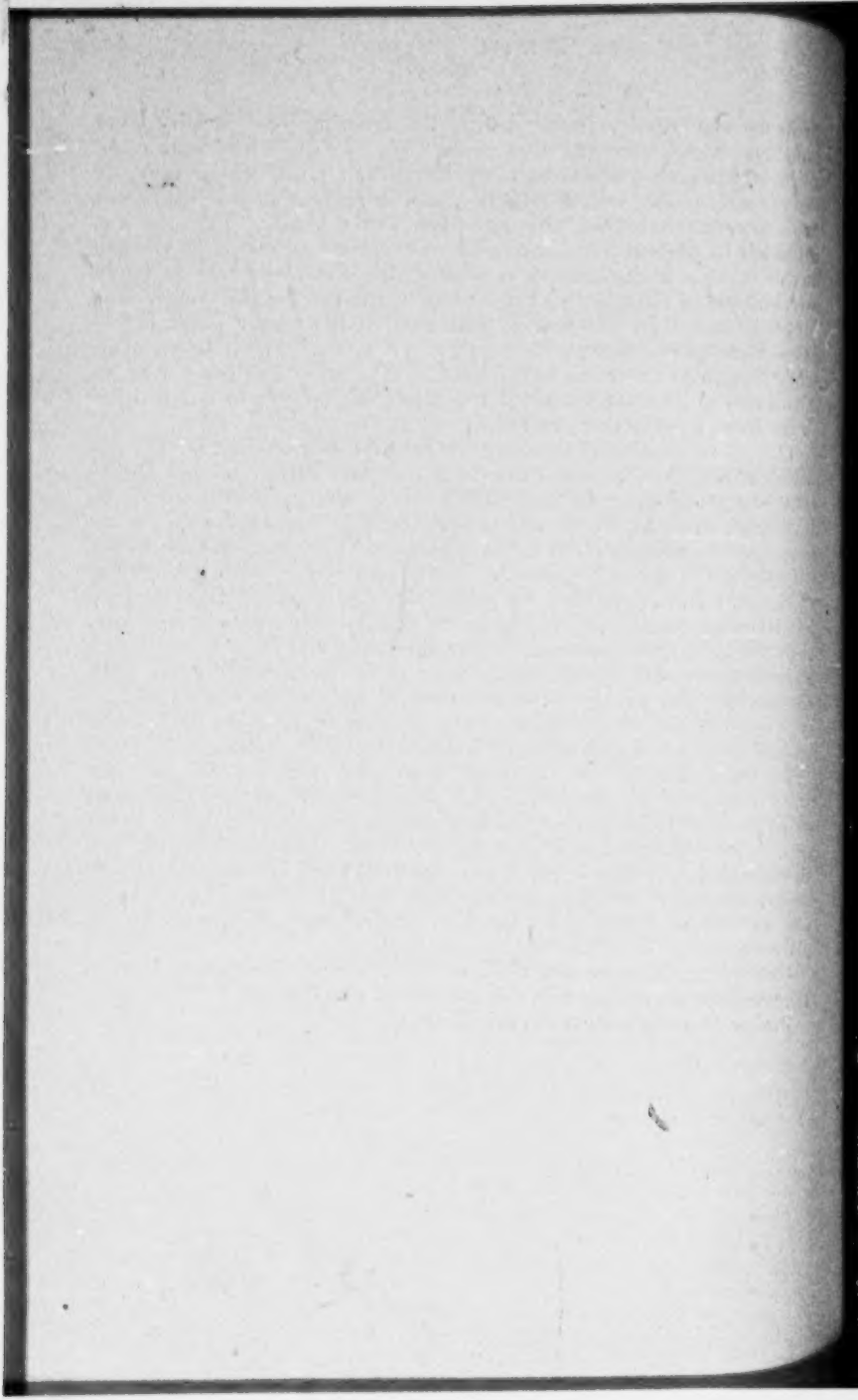
prevent the carrier from arbitrarily favoring one locality over another. Complaint had been made that, by discrimination in rates, railroad companies would build up towns and cities where they, or their management, owned property; and to prevent such injustice and arbitrary discrimination this provision was enacted. The act was intended to prevent the building up of favored centers of population at the expense of the country at large. But if the less rate is fairly attributable to the fact that the cost of shipment for the longer distance is less than the cost of shipment to the nearer point, it follows that the difference in charge is not attributable to an arbitrary design to favor one locality at the expense of another. And so if the less rate for the longer haul is fairly attributable to competition in business by water or otherwise.

The act of arbitrarily favoring one locality over another is that act which it was the purpose of the Constitutional Convention and Legislature to condemn. But if the difference in charge is attributable to legitimate motives, *that is, any motive other than that condemned by the law,* then there is no room for the operation of the law, as that which it prohibits is not in fact done. To charge a carrier with a violation of this law is, in substance, to charge it with unjustly favoring one locality over another, by charging the favored place with a less rate, though the shipment is for a longer distance; and it is a legitimate answer to say that the less charge was made for another cause than the one the law prohibits; and therefore, unless the law is one to regulate the cost of shipment or competition in business, the causes named may be shown to have induced the less charge.

It can hardly be claimed that the purpose of the law was to deprive Louisville of its low or competitive rate, or to attempt to place Lebanon in as favorable a geographical position as if it were situated on a large water-course. I think, therefore, that so long as Louisville is given only the benefit of its natural advantages, and only such low rates as flow from geographical position, it can not be said that there has been any arbitrary discrimination, to prevent which alone this law was adopted.

Conceding the force and vigor of the argument of the Chief Justice, I have been compelled to reach a different conclusion.

Judge Burnam concurs in this dissent.



No. 93.
Reply Brf. of Lindsay & Hines
Bruce for P. E.

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Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 93.

Filed Nov. 21, 1900.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO BRIEF FOR DEFENDANT IN ERROR.

WILLIAM LINDSAY,
WALKER D. HINES,
Counsel for Plaintiff in Error.

H. W. BRUCE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Plaintiff in Error.*

VERSUS

COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

Brief for Plaintiff in Error in reply to brief for Defendant in Error.

Throughout his brief counsel for defendant in error proceeds upon the assumption, which he reiterates in various forms, that plaintiff in error is contending for such a construction of the long and short haul provisions in question as will enable it to act as judge, jury, and legislature in its own case when its interests conflict with those of the public, and that this contention substantially amounts to a denial of the existence of governmental control in the regulation of railroads. On the contrary, we admit to the fullest extent that, as stated in L. & N. R. R. Co. v. Kentucky, 161 U. S. 677, corporations engaged in a public service are subject to legislative control so far as becomes necessary for the protection of the public interests.

Likewise, counsel for defendant in error assumes that the construction contended for by plaintiff in error would give it the exclusive right to decide for itself and the public what is reasonable, and the sole right of determining when competition exists. Yet our sole contention is and has been that if these long and short haul provisions were so construed as not to conflict with the Federal Constitution, the existence and character of competition would be questions of fact to be determined, when controversies arise, not by the railroad company but by the courts.

I.

Counsel for defendant in error on page 3 of his brief suggests that the Commonwealth was not called upon in the trial court to rebut or contradict the evidence offered by plaintiff in error, in as much as that evidence was properly excluded by the trial court. This, of course, begs the entire question at the outset, for that question is, was the evidence properly excluded? or, to state it in another form, are the constitutional and statutory provisions in question in conflict with the Federal Constitution when so construed as to result in the exclusion of that evidence?

On pages 5 and 6 of his brief counsel for defendant in error lays stress on the statement that there is no pretense that compliance by plaintiff in error with the constitutional provision would prevent its conducting its business so as to make a profit on the investment, and adds that, in every case where the attempted exercise of the power of legislative regulation of business affected with a public interest has been declared by this Court to be inoperative, it has been upon the ground that it was spoliation under the guise of regulation, or destruction rather than regulation. On page 12 he states that the legislative discretion can not be restricted unless in a particular case it is not an exercise of discretion, but the equivalent of confiscation.

In these assertions counsel confuses two entirely distinct inquiries. It is one thing to inquire whether a statutory regulation is *per se* in conflict with the Federal Constitution, because, as expressed in Lawton v. Steele, 152 U. S. 133, the interests of the public generally do not require such interference, or the means adopted are not reasonably necessary for the accomplishment of the purpose, and are unduly oppressive. It is quite another thing to inquire whether a statutory regulation, which is justifiable because required by the interests of the public generally, and which in general is fairly adapted to the accomplishment of the purpose, so operates in a particular case as to amount to spoliation

or confiscation. The case here is of the former character. Counsel's observations are pertinent only to cases of the latter character. In L. S. & M. S. R. Co. v. Smith, 173 U. S. 684, the Court held that the particular piece of legislation did not partake of the character of legislation fairly and reasonably necessary to attain any of the objects for which regulation might be employed, but was an undue interference with rights of the railroad company guaranteed by the Federal Constitution, and therefore held the statute void. This holding was not based upon the fact that the railroad company had shown that compliance with the statute would prevent all profit on its investment, nor that the statute amounted to spoliation or confiscation. The Court simply held upon the principle so well illustrated by the case of People v. Gilson, 109 N. Y. 389, that the statute was void because it was an unreasonable interference not fairly adapted to secure any legitimate public end.

We contend here that the Kentucky long and short haul provisions as authoritatively construed by the Court of Appeals of that State have no reasonable relation to, and are not fairly adapted to secure any legitimate end of police regulation, but that, on the contrary, they amount to a palpably unwarrantable interference with a perfectly legitimate branch of railroad business, and therefore that so long as those provisions are so construed by the courts of Kentucky they must be held to be in conflict with the Federal Constitution. The evidence introduced was simply to show the perfectly legitimate character of the traffic destroyed by that construction of the provisions, and to show the utter absence of any proper reason for upholding such construction as an allowable exercise of the police power. If we are correct in this contention, then the provisions must be held invalid, whether they in fact absolutely destroy the earning capacity of the railroads in Kentucky or not.

II.

On page 4 of his brief counsel for defendant in error, in justifying the construction put by the Court of Appeals upon Section 218 of the Constitution, insists that, as so construed, the section does not fix a rate, nor abridge the right of the carrier to charge a rate, that will be sufficient to secure a reasonable profit on its investment; that the fixing of the rates is left to the carrier under the general restriction that they must be reasonable, but that when a rate is fixed as reasonable to a longer distance point, then any excess over that rate for a shorter distance point is declared to be an unjust discrimination; or, as applied in the case at bar, if the carrier *for any cause* fixes as reasonable a rate of $1.00 per ton for the transportation of coal 147 miles, it shall not be heard to claim in any court that $1.55 per ton is reasonable for the transportation of coal for only 80 miles over the same route in the same direction. In illustration of his view, that this is a perfectly innocent form of regulation, counsel, in effect, indicates on page 8 of his brief that the State would without question have the right to require all charges to be in proportion to the mileage traveled.

These statements strikingly illustrate just the converse of the proposition in support of which they are adduced. It is well known that railway rates do not and can not increase in proportion to mileage, even when there are no exceptional competitive circumstances to interfere with their adjustment. Rates for very short distances are always very much more per mile than rates for long distances. If upon a given commodity the rate would be ten cents per hundred pounds for a distance of twenty miles, it would not likely exceed thirty cents for a distance of one hundred miles. If any statute should declare that railroad companies should charge at the same rate per mile on both short and long distances, that statute would necessarily be unconstitutional. It would either

require the transportation of freight for very short distances at rates unduly low, or it would absolutely destroy traffic for long distances by making the rates so high that the traffic could not bear them. Such regulation, moreover, would have no relation whatever to the promotion of the public welfare, and, instead of being a justifiable exercise of the police power, it would be an oppressive interference with the legitimate management of railroad business. It would be no more unreasonable to require that all classes of freight should be carried at the same rate per hundred pounds, which would result in ruinously low rates on high class goods or the utter destruction of low class traffic. It would be scarcely more unreasonable on its face, and perhaps less disastrous in practice, to require both passengers and any given class of freight to be carried at the same rate per hundred pounds.

With respect to conditions existing in the State of Kentucky, the long and short haul provisions of that State, as construed by its Court of Appeals, are, as counsel for defendant in error very properly assumes, quite analogous to the suggested requirement that all rates should be constructed on a mileage basis. Just as it is in all localities absolutely necessary to charge high rates per mile for short distance, and very much lower rates per mile for long distances, in order to conduct railroad business successfully, so in the State of Kentucky, where traffic is not dense, and where water competition is at many places very powerful, it is absolutely necessary to the successful conduct of the railroad business to charge higher rates on the ordinary local business of the railroads, and at the same time to accept less aggregate rates on long hauls when necessitated by competition. Precisely the same principle necessitates and justifies this course as necessitates and justifies the charge by railroad companies everywhere of higher rates per mile on short hauls than on long hauls, and higher rates on high class goods than on low class goods. While, of course, the element of difference in expense substantially enters into the two latter adjustments

more than in the other adjustment, yet the difference made between the rates per mile on short and long hauls, in the absence of competition, and in the rates on high and low class goods for the same hauls, are very much greater than could possibly be justified by any demonstrable difference in expense, and those differences in rates rest ultimately upon the same sort of commercial conditions as control the long and short haul charges involved in this case.

As counsel for defendant in error states, Section 218, as construed by the Court of Appeals, declares that if the carrier *for any cause* fixes a rate of $1.00 per ton for transporting coal from Altmont to Louisville, it shall not be permitted to charge $1.55 per ton for a shorter haul; in other words, the section absolutely prohibits giving any consideration to the most controlling cause affecting transportation, *i. e.*, competition. Plaintiff in error offered proof that the cause of its charging only $1.00 per ton from Altmont to Louisville was controlling and unavoidable competition, and that no such competitive conditions existed at Lebanon, and, therefore, that the charging of this low rate was not a criterion as to what would be a reasonable rate at Lebanon. Under the circumstances shown in the record the charging of $1.00 per ton to Louisville threw no more light on what was a reasonable rate to the non-competitive point, Lebanon, than the charging of $1.55 per ton on coal to Lebanon would throw upon the question of the reasonableness of a rate of ten or twenty times that much on high class merchandise for the same distance. In other words, Section 218, as construed by the Court of Appeals, selects what this record demonstrates is in this case a wholly immaterial circumstance and makes that the absolute criterion of what is a reasonable rate to Lebanon.

Plaintiff in error was prepared to demonstrate that the rate to Lebanon was reasonable and just. In the case of L. & N. R. Co. v. Commonwealth, 18 Ky. Law. Rep. 42, 35 S. W. 129, involving the reasonableness of the very same rate to Lebanon from a point near Altamont, under a statute prohibiting

extortion, the Court of Appeals had by the following language declared that rate to be legal:

> "It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law."

The result is that the section is made to prohibit either the continued enjoyment of a perfectly legitimate, innocent, and valuable competitive traffic, or to require the arbitrary, horizontal reduction of non-competitive rates, which the carrier was prepared to show were reasonable, and which the courts of the State had declared to be legal. An exactly similar statute has been held inoperative in cases of controlling and unavoidable competition, as pointed out in our originial brief, in Ex-parte Koehler, 23 Fed. Rep. 529. The same court in Ex-parte Koehler, 31 Fed. Rep. 318, 320, announced that the right to meet such competition by less charges than for shorter hauls was a common law right of the carrier. This case was referred to with approval by this Court in Interstate Commission v. Alabama Midland Railway Co., 168 U. S. 164.

It is submitted that any such absolute destruction of traffic essential to the railroad company's prosperity or any such arbitrary reduction of rates already admittedly legal can not be a means fairly adapted to securing either reasonable rates for non-competitive points or preventing unjust discrimination in favor of competitive points. The latter object was evidently the one had in view by the adoption of Section 218, as is fully recognized by the Court of Appeals in the case at bar. In its opinion the Court of Appeals, in pointing out the reasons for the adoption of the section, said it had been notorious that railroad managers had by discrimination in favor of certain shippers or a given

locality brought ruin to others, and that it was the aim of the Constitution to require the railroads to treat all fairly and with equality. (Transcript, page 83.) Yet, this object of preventing discrimination between localities would be fully secured, as is done under the Interstate Commerce Act, by prohibiting the less charge for the longer haul when it is not necessitated by controlling and unavoidable competition, or when it is lower than necessity requires, or when it is so low as to occasion an increase in what would otherwise be the rate to the non-competitive point. This would fully protect the rights both of the public and of the carrier.

The section was evidently not designed to secure reasonable rates *per se* to non-competitive points, or if it had such design, it can not for the reasons already pointed out be regarded as a means fairly adapted to that end, being in its nature perfectly arbitrary and rendering it impossible for the carrier to secure judicial protection if such reduction were unreasonable.

III.

It is so clear that the iron-clad prohibition of charging more for a short than for a long haul on railroads situated as are the Kentucky railroads would be a wholly unreasonable interference with the legitimate operation of those roads not relating to or promoting the public welfare, but working the greatest injustice and hardship to the railroads without the opportunity for judicial protection, that counsel for defendant in error virtually concedes (page 10 of his brief) that such an iron-clad rule would be unconstitutional because of the hardships resulting to the carrier, and to sustain the provision he practically relies exclusively upon the proviso giving the railroad commission authority to grant relief from such hardships. The opinion of the Court of Appeals in this case, and the opinion of that court in the former long and short haul case which it followed here, both show that it, too, regarded

an iron-clad prohibition as imposing unwarrantable injustice upon the railroad, and that it was just and necessary to provide relief therefrom, and regarded the proviso as affording this relief, and saving the provision from the constitutional objections.

Counsel for defendant in error admits throughout his brief what is very clear from reading the opinions of the Court of Appeals, that this authority in the railroad commission is exclusive and conclusive, that it is "a power not shared by Governor, courts or legislature." In the case of L. & N. R. Co. v. Commonwealth, 20 Ky. Law Rep. 1380, in which the federal questions were not raised, the Court of Appeals said: (See page 37 of our original brief.)

> "The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion the Court has not jurisdiction to either compel the Railroad Commission upon application of the common carrier or those interested in particular industries or callings to suspend or relax operation of Section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit suspension or relaxation in special cases. While the Commission is thus, and to that extent, free from judicial interposition, it can not of course nullify or except in special cases at all suspend operation of Section 218; and though the Railroad Commission be invested with this unusual power, it must be treated as a constitutional power with which the Court can not interfere."

In the case at bar, which admittedly involved the same questions of construction as the case just cited, the Court said (Transcript, pp. 82, 83):

> "We are urged to overrule that case; but it was fully considered and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation."

Throughout its opinion the court treated the railroad commission as entirely independent of the courts.

It becomes necessary, therefore, to consider the arguments of counsel for defendant in error in support of the sufficiency of the proviso as thus construed to relieve Section 218 of the constitutional objections.

Apparently overlooking his virtual concession that Section 218 without the proviso would be unconstitutional, counsel for the defendant in error dwells upon the fact that the power exercised by the Commission is only for the benefit of the carrier, "does not increase the rigor of the law," nor "impose any burden upon the carrier." Since the prohibition of the section, as construed by the Court of Appeals, is as rigorous as a disregard of the practical and constitutional rights of the carrier could make it, and imposes upon the carrier all the burden the subject admits of, it is not strange that the ample powers of the Commission do not admit of additional impositions or rigor; but counsel clearly makes no progress in these observations in demonstrating the sufficiency of the proviso to relieve the section of its constitutional objections. It may be suggested, however, that in the unlimited freedom of the Commission to grant relief to one, and to withhold it from another, the Commission can in an indirect way impose the most grievous burden upon both railroads and localities by putting them at a disadvantage with others more favored by the Commission.

IV.

Counsel for defendant in error contends that the power of the Commission is not arbitrary, but is to be exercised only after investigation, and that this differentiates the case from Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418. He adds that the "command to investigate" on the carrier's application "necessarily requires of the Commission a full and fair consideration of every

fact and argument presented by the applicant that could affect the interests of the carrier and the public." (Page 11 of his brief.)

The proviso in question reads as follows:

> "Provided, that upon application to the Railroad Commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases after investigation by the Commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

It might possibly be held that the commission would violate its duty if it granted relief from the section without investigation, although it seems to be given plenary power from time to time to prescribe the extent to which a carrier may be relieved from the operation of the section, without any accompanying requirement that it shall investigate the matter. But this requirement of investigation, so far as it goes, was evidently imposed for the protection not of the carrier but of the public. The investigation is required only in cases where the relief is granted, and if the relief be granted to the carrier, it is immaterial to him whether there has been investigation or not. There is no requirement that the commission shall investigate the applications which the carrier makes. In other words, there is not, as counsel for defendant in error assumes, any "command to investigate." The carrier may apply to the commission, and the commission may refuse absolutely to consider the application, and yet in no way violate its duty under the law. The Court of Appeals has nowhere said it was the duty of the commission to investigate upon application of the carrier. It is true the Court of Appeals said in this case,

> "It is the duty and no doubt will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole shall be promoted."

But this Court, in Yick Wo v. Hopkins, 118 U. S. 356, refused to be controlled by a much more specific declaration of the Supreme Court of California, and it is manifest that the language just quoted finds, as to what it says about the railroad commission's duty, no more support in the constitutional provision than it finds there as to what it says about the railroad commission's pleasure.

The fact is that under this proviso the railroad commission has full liberty to refuse to entertain any application that may be presented to it by any carrier.

In Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, the railroad commission was charged with the express duty of fixing equal and reasonable rates to be charged by the railroad companies. Here, at least, was a rule of action laid down to guide the commission; yet for reasons which will be discussed below, this Court held that the act as construed by the Supreme Court of Minnesota was in conflict with the Federal Constitution. Section 218, however, prescribes no rule of action to be observed by the commission, and indeed imposes no duty whatever upon the commission. It simply gives the commission the right, if it chooses to do so, to suspend the section without requiring it to entertain applications of carriers and without intimating when, or under what circumstances, or to what extent such suspension shall be granted.

If the section were so framed as that there were no imposition upon the railroad company until the commission had taken action, it might be easier to twist the word "investigation" in the proviso into some sort of protection for the carrier. It is not, however, the action, but the non-action, of the commission which imposes the burden upon the carrier, and there is nothing

in the section which gives the carrier the faintest suggestion of a right to set in motion any sort of machinery to put an end to the non-action of the commission.

Counsel for defendant in error, on page 9 of his brief, quite aptly likens the prerogative of the commission, under the proviso of Section 218, to the pardoning power of the governor and the power of the legislature to make exceptions in the laws, and complacently adds that, "in each case the result is final." A pardon is of course a matter of grace, and not of right; and so is the favor of an exception incorporated by the legislature in any of its enactments. It is undoubtedly true that the power of the railroad commission under this proviso is precisely of the same character. An unconstitutional restriction is imposed upon the carriers of Kentucky by Section 218, and then it is sought to escape the consequent invalidity of the section by pointing to a proviso which affords the carrier the probability, or, at any rate, the possibility, of securing gracious concessions from the railroad commission!

It is true that the procedure outlined in Section 820, Kentucky Statutes, does provide for notice and investigation upon complaint made to the Commission (without, however, laying down any rule to guide the Commission's action), but that procedure is a mere incident to the prosecution. The carrier is necessarily guilty of a violation of the Constitution before any complaint can be made under the statute. The Court does not even hold that the procedure outlined in Section 820, Kentucky Statutes, *must* be followed before the carrier can be successfully prosecuted for violating that section. In any event, that section does not affect the civil consequences of violating Section 218 of the Constitution, nor can the *carrier* in any case demand a hearing and investigation under Section 820, Kentucky Statutes, for obviously such hearing and investigation are to be only at the instance of some one complaining against the carrier.

After all, the provision which controls the carrier's conduct and forces it either to abandon its competitive traffic or to accept

without redress such conditions as the railroad commission may impose is Sec. 218 of the Constitution. The civil consequences alone of violating that section would compel compliance with it, regardless of any prosecutions. There is nothing in Sec. 820, Kentucky Statutes, which, according to any construction, lessens the practical effect of the absolute prohibition of Sec. 218 of the Constitution, or which imposes upon the railroad commission any duty to give the carrier a full hearing upon its application under Sec. 218 or to afford it relief in proper cases, or which in any way affects the absolute and uncontrolled power of the railroad commission thereunder.

It must, too, be constantly borne in mind that in dealing with these vital interests of the carriers of Kentucky in this final and conclusive fashion the commission would necessarily act according to its mere will, uncontrolled and undirected, and would thus have precisely the power condemned by this Court in Yick Wo v. Hopkins, 118 U. S. 356.

V.

But even if the proviso required the commission to entertain and investigate the carrier's application for relief from the unreasonable hardships of the section, and enacted some sort of rule by which the commission should be governed in granting or withholding relief, the proviso would still not afford constitutional protection to the carriers, because it would turn them over absolutely to the railroad commission without any opportunity at any time in any form to have any measure of judicial assistance in regard to or protection of the rights which are most vital to their existence.

Counsel for defendant in error takes the broad ground (page 7 of his brief) that all legislative power, all administrative power, and all judicial power, which the State of Kentucky may exercise in the regulation of common carriers, may be vested in the railroad commission if the organic law of the State

so provides, and from this premise he deduces the conclusion that the final and conclusive powers attributed to the railroad commission by the Court of Appeals under the proviso of Section 218 of the Constitution are not in conflict with the Constitution of the United States.

Section 27 of the Constitution of Kentucky is as follows:

> "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 28 of the Constitution of Kentucky reads as follows:

> "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Section 109 of the Constitution of Kentucky reads as follows:

> "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

The courts established by the Constitution, in addition to the Court of Appeals, are Circuit Courts (Section 125), Quarterly Courts (Section 139), County Courts (Section 140), Justices' Courts (Section 142), Police Courts (Section 143), and Fiscal Courts (Section 144).

Section 135 of the Constitution of Kentucky reads as follows:

> "No Courts, save those provided for in this Constitution, shall be established."

By Section 209 of the Constitution a commission was established to be known as "The Railroad Commission," to be

composed of three Commissioners. After providing for the method of their selection and the filling of vacancies, the section provides:

> "The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed, and allowed by law to the existing Railroad Commissioners."

The Constitution of Kentucky did not establish the railroad commission as a court. At the time of the adoption of the Constitution the railroad commission was essentially a ministerial tribunal. (1 Acts 1881-2, p. 65.) After the adoption of the Constitution the legislature, in pursuance of its power preserved by Section 209, re-enacted the railroad commission law, and it was provided that the duty of the commission should be (Ky. Stats., Sec. 821)

> "To see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State."

Thus the railroad commission of Kentucky is essentially an administrative or ministerial tribunal, charged in that capacity with the supervision of the railroads of the State and with the duty of seeing that those railroads obey the laws. The railroad commission is not a court, and under the Constitution of Kentucky can not be made a court, and can not exercise judicial functions. But even if, notwithstanding the various provisions of the Constitution referred to, it should be held that the commission may exercise such judicial functions as are necessary to carry out the proviso of Section 218, since that is itself a part of the Constitution, the fact still remains that the commission is primarily and essentially an administrative tribunal. As such it is necessarily charged with duties and powers which, in the

nature of things, as viewed in the light of republican institutions, make it not a fit tribunal to be vested with final judicial powers of serious importance.

In Western Union Telegraph Co. v. Myatt, 98 Fed. Rep. 335, the United States Circuit Court for the District of Kansas held the act of Kansas, creating the Court of Visitation, to be in conflict with the Federal Constitution, because it entrusted to one tribunal final judicial powers as well as wide powers of an administrative and legislative character. The Court said (pp. 354, 355):

> "In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the fourteenth amendment to the constitution? Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts can not legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, can not render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law. . . . It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance, as it would be to confer judicial powers upon an executive officer. . . . That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life, liberty or property of a person, is a startling proposition, and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings. . . . I am

therefore of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or a telegraph company, would not be due process of law within the meaning of the Federal Constitution."

The same statute came shortly afterward before the Supreme Court of Kansas, and that court likewise held it to be unconstitutional and void, "for the reason that in the powers conferred upon that tribunal, legislative, judicial, and administrative functions are commingled and interwoven together in a manner violative of the constitutional requirement that the three great departments of government shall be kept separate, and the powers and duties of each exercised independently of the others." State v. Johnson, 60 Pac. 1068.

Counsel for defendant in error on page 2 of his brief calls attention to the fact that the railroad commission in its order refusing to exonerate plaintiff in error reserved the right to "suspend the operation of this order should said company reduce its rates on said commodity from said points of shipment to Lebanon, Ky., said reduced rates to be approved by this Board." In other words, the railroad commission required plaintiff in error, as the price for retaining the perfectly legitimate and innocent competitive traffic to Louisville, which was of very great value to the plaintiff in error, to reduce its rates to Lebanon to such figure as the commission might approve, although such rates were not attacked as unreasonable, were in nowise increased by the enforced charging of the low competitive rate to Louisville, and were far within the maximum authorized by the Legislature.

The Court of Appeals, both in this case and in the former long and short haul case already referred to, has clearly indicated that whatever rate to Lebanon the railroad commission might thus have imposed upon plaintiff in error, would have been wholly free from judicial review. If plaintiff in error had been

willing to acquiesce in such rate, although unreasonably low, in order to retain the valuable traffic to Louisville, it could have had no redress in any court. If it, instead, had preferred to surrender the valuable competitive traffic to Louisville, it still would have had no redress in any court.

Ever since the decision by this Court of the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, it has been settled that:

> "The question of the reasonableness of a rate of charge, for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

It is true that in that case the commission could take affirmative action detrimental to the railroad company without a hearing and without notice to the Company. It is equally true that under the proviso of Section 218 the commission may do that which is detrimental to the railroad company, that is, refrain from taking any action at all, without any hearing of the railroad company, and may without violation of its duty absolutely refuse to consider any application presented by the company. But the case just cited laid stress upon the fact that the question involved was a question for an investigation by judicial machinery. That doctrine has never been departed from by this court. While the court has not perhaps always insisted that the investigation before the rate-fixing tribunal

should be judicial in its character, and indeed, has perhaps regarded any investigation as wholly immaterial when the rates were fixed directly by the legislature, yet in every case, no matter how the rates have been fixed, the court has upheld the right to an investigation in the courts as a matter of right guaranteed to the railroad company or other corporation by the Constitution of the United States.

The operation of Section 218, as construed by the Court of Appeals, is peculiar in the fact that the railroad company has no opportunity at any time or in any manner to invoke the protection of any court. If the section is in itself constitutional, then the company must give up its valuable competitive traffic or reduce its intermediate rates to such figure as the Railroad Commission may impose. If the Commission imposes unreasonably low rates, the railroad company can not have that action reviewed in any form. So that with respect to the traffic, both long haul and short haul, the railroad company is under this construction deprived of the judicial protection which has been afforded every corporation under every other railroad commission act in the country.

Following out the same theory, counsel for defendant in error contends that the forms of procedure may in all matters vary as the legislature may prescribe. He overlooks the fact that the procedure must be reasonably adapted to the subject-matter. It is true that with respect to some subject-matters, very summary forms of procedure are admissible. For example, property may be assessed by an administrative officer or board, and the courts will refuse to review that assessment. This, however, is admittedly an exception to the general rule. It is an exception because the exigencies of the public treasury will not admit of the delay which would be involved in ordinary proceedings in court. Moreover, it is an exception which operates substantially alike upon all citizens and persons within the protection of the State. Moreover, it affects any one citizen or person only in an incidental way. While it is vital to the State, it is not ordi-

narily vital to any one person whose property is assessed. None of these reasons applies to making the finding of an administrative board conclusive in like manner with respect to the right of a railroad company to use its property in a reasonable, innocent way in the prosecution of a legitimate railroad business. There is no corresponding public exigency; if the railroad company inflicts injury by an illegal act, it may be made to respond in damages. The right thus involved is one of vital importance to the railroad company, and when all other persons are permitted to enjoy even their incidental rights under the protection of the courts of the country, it certainly is not proper to relegate railroad companies for the final judicial determination of their most vital rights to a mere administrative tribunal.

However, the argument to differentiate the case of the regulation of railroads from the case of assessment of property for taxation is wholly unnecessary, because the courts of this country have consistently, from the Minnesota case, 134 U. S., down to the present hour, refused to accept as final and conclusive the findings of a railroad commission, or even of a legislature, but have in all cases proceeded to investigate the question for themselves, and to afford the railroad companies the protection guaranteed to them by the Federal Constitution.

It is occasionally stated that a railroad company in the transportation of passengers and property is performing a function of the State, and is subject to regulation accordingly. Counsel for defendant in error must proceed on the theory that the State may regulate the details of railway traffic to the same extent as if the State were actually operating the railway.

It should be borne in mind, however, that while the State has generally provided highways upon which persons and property might move, and has done this to such an extent that providing such highways may properly be said to be a function of the State, yet neither in England nor in America has the government, except in rare instances, undertaken the duty of transporting either persons or property on any sort of highway,

whether turnpike, canal, or railroad, so that the actual transportation of traffic can not properly be said to be a function of the State. In other words, while frequently furnishing the highway upon which common carriers of various sorts have conducted their business, the government itself has not conducted the business of a common carrier any more than it has conducted the business of keeping inns, although generally providing the highways to and from those inns. It is true the government may regulate the management of the business of both common carriers and innkeepers, but it is not because they are performing a function of the State, but because they are performing a business which is affected with a public use. As was said in L. S. & M. S. R. Co. v. Smith, 173 U. S. 684-698:

> "The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest."

In the case last cited the court also said (page 690):

> "A railroad company, although a *quasi* public corporation, and although it operates a public highway, Cherokee Nation v. Southern Kansas Railway, 135 U. S., 641; Lake Shore, etc., Railway v. Ohio, 173 U. S. 285, 301, has, nevertheless, rights which the Legislature can not take away without a violation of the Federal Constitution, as stated in Smyth v. Ames, 169 U. S. 466, 544. A corporation is a person without the protection of the Fourteenth Amendment."

And again (page 697):

> "What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company, upon its own volition, purely as

a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

If the numerous decisions of this Court on this subject mean any thing, they mean that under the Fourteenth Amendment to the Constitution of the United States, no State can, either through its legislature or a railroad commission, destroy the legitimate uses of a railroad or any one of such legitimate uses, nor can the State, either through its legislature or a railroad commission, so reduce the rates of a railroad company as to interfere with its obtaining what, under all the circumstances, is a reasonable income from its property, and that the courts must have the right to decide these questions for themselves. In the Minnesota case, 134 U. S., this Court held the act of Minnesota void because, as construed by the State court, it deprived the railroad company of all opportunity to question in the courts the correctness of the rates fixed by the railroad commission. In every case that has since arisen there has been in some form an opportunity for railroad companies to question in the courts the reasonableness of rates fixed for it by a railroad commission. Such opportunity has not always, or perhaps generally, been afforded by the railroad commission act itself, but the *nature* of the subject has been such as to give to the railroad company a fairly reasonable opportunity to bring the question before the courts.

If Section 218, as construed by the Court of Appeals of Kentucky, means any thing, it means that the State can either absolutely destroy perfectly legitimate and innocent competitive traffic, the enjoyment of which is essential to the carrier's prosperity, and not injurious in any way to the public, or that the railroad commission may use the threatened loss of this competitive traffic as a lever to force the railroad company to adopt

such rates on non-competitive traffic as the commission may fix, free from any possibility in any form of securing a consideration of those rates in court.

The difference between Section 218, as construed by the Court of Appeals, and all of the railroad commission cases which have heretofore come before this court (except the Minnesota act which was held void) is that Section 218 not only fails to provide judicial machinery for investigation of the subject, but, by reason of its peculiar operation in imposing the initiative on the carrier and making whatever the carrier does appear as done of its own volition, it absolutely destroys all opportunity in any form of resorting to the courts, if it is valid for any purpose as construed by the Court of Appeals.

VI.

Counsel for defendant in error points out that no application to the Railroad Commission was made.

As is pointed out in our original brief, if Sec. 218 as construed by the Court of Appeals is valid enough to compel an application to the commission, then it is valid all purposes, for the whole theory of that construction is that the commission's action or refusal to act on the application is not subject to judicial regulation in any form.

But if the section becomes more unconstitutional when the Commission refuses to grant relief, then we know that in the present case the Commission did consider this very matter and did refuse to grant any relief unless the railroad company would adjust its local rates so as to suit the commission's wishes, which wishes, as the Court of Appeals indicates, are free from any review or control by the courts.

Before leaving this branch of the subject we wish to urge on the Court again the careful consideration of the dissenting opinion herein, which was concurred in by three of the seven Judges of the Court of Appeals, and which so forcibly points

out the unconstitutional character of the provisions as construed by the other four Judges of the Court.

VII.

The comments of counsel for defendant in error upon the question of Interstate Commerce might be pertinent if the provisions under consideration constituted in themselves means fairly and reasonably adapted to secure some object having an appreciable relation to promoting the public welfare; but since those provisions as construed by the Court of Appeals are not called for by, and can not possibly promote, the public welfare in any direction, and instead of being means fairly adapted to a legitimate end are really the most arbitrary interference with a highly important and perfectly innocent branch of railroad business, the fact that those provisions do substantially embarrass commerce among the States is worthy of consideration, although that interference may be in one sense indirect.

VIII.

The comments of defendant's counsel on plaintiff in error's contention that the provisions in question, as construed by the Courts of Kentucky, impair the obligation of its contract with the State, seem to be based on an entire misconception of that contention. He seems to assume that the contention is that plaintiff in error is exempt from legislative regulation, and that it has acquired the indefeasible right to exercise its own discretion in the management of its business, and that the State of Kentucky has, by the charter granted plaintiff in error, bound itself never to exercise its police power in regulating the use of the highway occupied by plaintiff in error's railroad. It is unnecessary to say that no such contentions are made.

Counsel seems to think that plaintiff in error looks upon its charter as a positive grant authorizing it to discrimi-

nate in its charges. The word "discriminate" with respect to railroads is obviously used in two entirely different senses. It is frequently used in the sense of unjustly discriminating. Plaintiff in error admits to the fullest extent the right of the State to prohibit all such unjust discriminations, and to enact all laws which are reasonably adapted to secure immunity to the citizens or localities of the State from such unjust discriminations. The word "discriminate," however, is also used in its primary sense, *i. e.*, using one's discretion or judgment. In that sense every railroad company has a right to discriminate as a necessary part of its right to do business. When a railroad company charges a rate of five cents per hundred pounds on a car load of brick, and two dollars per hundred pounds upon a box of dry goods, it discriminates. If it did not have the right to discriminate between high class and low class freights, no railroad in this country could be operated. The State would not have the right to say that all freights of every class shall be carried at the same rate per ton, for that would be wholly unreasonable, would have no relation to promoting public welfare, and would virtually destroy the ability to operate the railroad. In this sense the railroad company does not have to look to any positive grant of power in its charter. The power to construct and operate a railroad necessarily implies power to exercise judgment in fixing its rates. While discrimination of this character may be reasonably regulated, it can not be destroyed or so hampered as to result in an unwarrantable partial destruction.

Counsel for defendant in error seems much impressed by the fact that in 1860 an amendment was granted authorizing railroad companies to make discrimination in favor of freights and passage for long over short distances, and seems to think that if the State had the right to repeal this authority, it had the right to make an iron-clad long and short haul law. It should be observed, however, that this amendment seemed to embrace an unlimited authority to discriminate, and so was a power which the railroad company did not have independently of such authority, and is

not the power which we now claim. It clearly did not restrict the right to discriminate to cases of competition or require the long haul rates to be as high as the competition would permit or prohibit increasing the short haul rates on account of the less charges for longer hauls. We do not rely in any sense upon that amendment, or upon the theory that we have in any way an unlimited power to discriminate. We simply claim the right to charge reasonable rates for non-competitive traffic, and at the same time the right to engage in profitable competitive traffic at less rates, where doing so does not increase the rates which would otherwise be charged on the non-competitive traffic, does not give the competitive point any advantage over the non-competitive point, and does not in anywise injure one person or locality, or build up another, in other words, where the long haul rate is as high as can be charged, and where it does not necessitate increasing the short haul rate to more than it would otherwise be—the short haul rate being at all times just and reasonable in itself. The right to do this under the circumstances existing in Kentucky, where it is impossible to reduce intermediate rates to the basis of long haul rates, and where at the same time the retention of the long haul business is essential to the prosperity of the railroad company, is a right which the Company had independently of the amendment of 1860. It is a right which was much narrower than the right granted by that amendment, and it is a right which it still has under the Constitution of the United States. The denial of that right does not in any way tend to promote the public welfare. It is not a means fairly adapted to secure rates reasonable in themselves for the shorter hauls, or the prevention of unjust discrimination between localities. It is an arbitrary interference with what under the circumstances of this record is a reasonable use of the railroad company's property, and it gives to the railroad commission, which is a wholly non-judicial tribunal, power to give or withhold, at its own arbitrary pleasure, the right to engage in most important branches of business which are perfectly legitimate. Since by virtue of its charter the railroad company has a contract right

to the reasonable use of its property for railroad purposes, Sec. 218, as construed by the Court, impairs the obligation of that contract as well as contravenes the Fourteenth Amendment.

The argument of defendant's counsel that plaintiff in error has consolidated with other corporations and is not therefore now the corporation which was granted the charter of 1850 is wholly unsupported by the record. There is not a syllable in the record to show that the plaintiff in error has ever at any time consolidated with any other company, although it may have had the right to do so.

IX.

This very lengthy reply to the brief for defendant in error has been prompted by an earnest desire to discuss in all its bearings, as far as practicable under the circumstances, the questions involved, which are of paramount importance.

The record shows that the enjoyment of long haul competitive traffic at less than non-competitive rates is of an importance to the railroads and public in Kentucky vastly greater than is likely to be appreciated by those not familiar with the local situation who look at the matter from the standpoint of traffic conditions in other sections of the country.

In addition to the direct value of the question to the industrial interests of the State, the principles involved are of the most far-reaching character. The question involved is whether a State may so devise a form of regulating certain essential branches of railroad traffic as to evade entirely that judicial supervision which this Court, in order to afford to railroad companies the protection to which it is well settled they are entitled under the Constitution of the United States, has consistently enforced.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 7.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

WALKER D. HINES,
For Plaintiff in Error.

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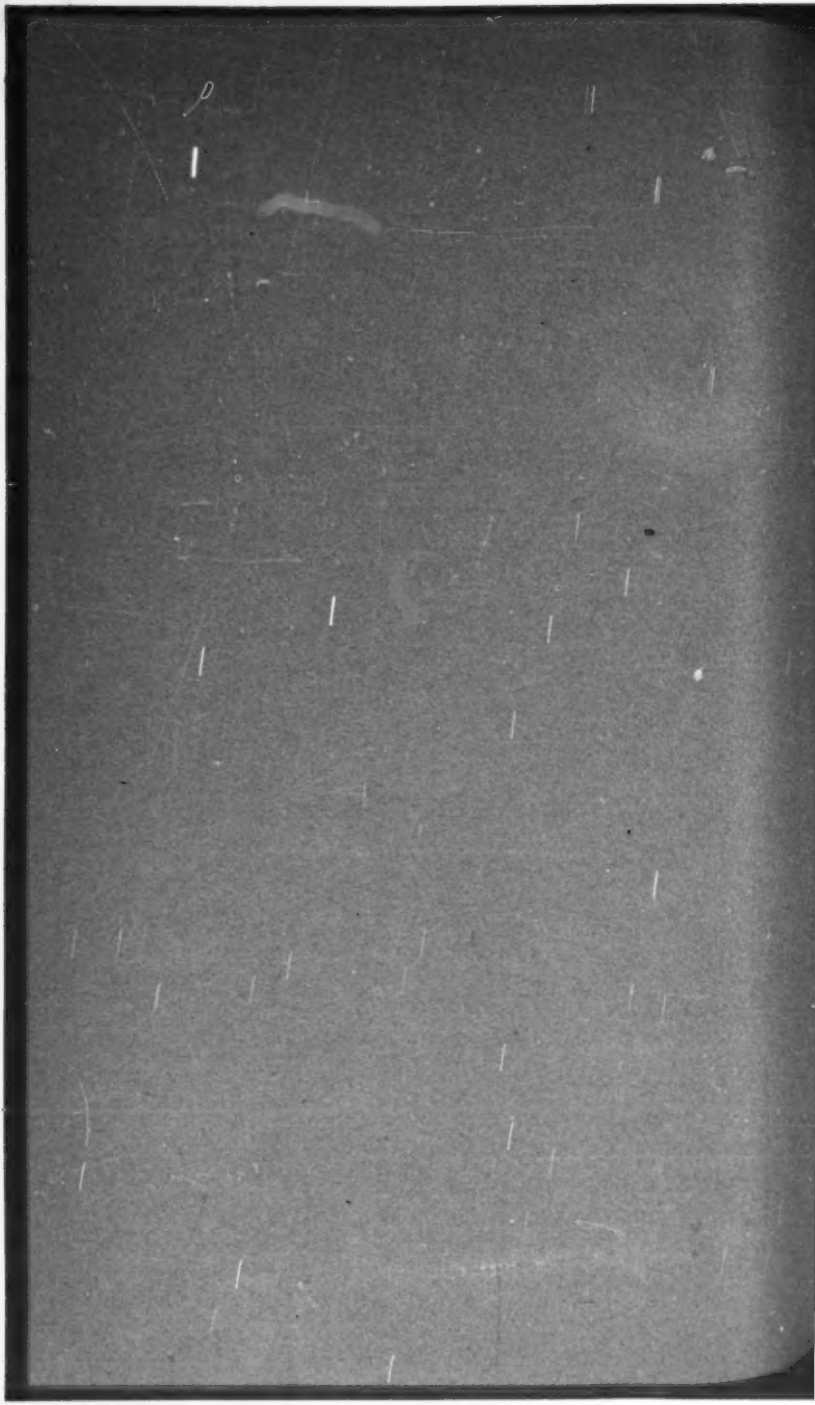

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ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

I.

The law-making power of the State is not the final judge as to whether its enactments have such reasonable relation to the promotion of the public welfare as to justify them as an exercise of the police power. The courts have repeatedly, as is shown by many cases cited in our other briefs, stated that they have the power to inquire into this matter, and are not concluded by the action of the law-making power; and in many cases the court has

actually set aside such enactments because the court believed, the law-making power to the contrary notwithstanding, that the enactments had no reasonable relation to the police power, but were an unreasonable interference with the rights of the citizen. In addition to the cases already on our briefs, the recent case of Wisconsin, &c., R. Co. *vs.* Jacobson, 179 U. S., 287, contains a clear statement of the right and duty of the court in cases of this character, and of the scope of the inquiry which is open to the court, notwithstanding the declaration of the law-making power.

These cases show that this right to hold enactments in conflict with the fourteenth amendment, because an unreasonable and unjustifiable interference with the citizen's use of his property, does not depend upon any showing of confiscation in the particular case. On the other hand, it depends upon showing that the enactment in question has no reasonable tendency to promote any legitimate object of the police power, but does amount to an improper interference with the citizen in the use of his property. Such enactments have been held void entirely without any showing that they would in effect destroy, or even substantially impair, the earning power of the citizen's property. If the enactment goes to the extent of destroying any element of the use of the property, or any incident to that use which is thoroughly consistent with the public welfare, or, in other words, which does not tend in any way to injure others in the use of their property and the enjoyment of their rights, and when at the same time such prohibition has no reasonable tendency, either directly or indirectly, to promote any object for which the police power can be exercised, it necessarily follows, according to the well-settled doctrine of this court and of

all other courts, that such an enactment is an unconstitutional invasion of property rights.

The case of Powell *vs.* Pennsylvania, 127 U. S., relied on by counsel for defendant in error, clearly illustrates that this court will assume to inquire whether a State enactment has a reasonable relation to the promotion of the public welfare, and will base its determination as to the constitutionality of the enactment under consideration upon the result of its inquiry. In that case the court, after canvassing fully the reasons which could have prompted the legislature to pass the statute against the sale of oleomargarine, was unable to say that the statute might not have a reasonable tendency to protect the public health, and consequently could not declare the statute unconstitutional. Here we contend the court, upon an examination of the matter, is bound to say that the Kentucky long and short haul law, as construed by the court of appeals of Kentucky, cannot have any tendency whatever to promote the public welfare.

II.

The mere fact that a railroad company is engaged in a quasi-public business does not give the law-making power unlimited right to regulate its affairs. In regulating the physical operation of railroads the legislature can, of course, make such prohibitions or requirements as have a reasonable tendency to promote public safety, convenience, etc. In interfering with the adjustment of the rates which the railroad company shall charge for the transportation of persons and property, the legislature

cannot, as is clearly shown by L. S. & M. S. R. Co. *vs.* Smith, 173 U. S., 684–697, control that matter to the extent to which the railroad company itself can do so. On the contrary, the legislature's authority is limited, as is shown by the last-mentioned case, page 698, to preventing extortion or unreasonable charges or exactions. These unreasonable charges must necessarily fall into one or the other of the two comprehensive classes of extortion and unjust discrimination.

The case of East Tennessee, &c., R'y Co. *vs.* Interstate Commerce Commission, 181 U. S., 1, clearly illustrates that a prohibition proceeding upon exactly the same theory as the long and short haul law of Kentucky proceeds—*i. e.*, which absolutely ignores the element of competition—has no tendency to prevent either extortion or unjust discrimination.

Such a prohibition cannot reasonably relate to the prevention of extortion,—

"For, of course, a decree which ordered the carriers to "desist from charging a greater compensation for the lesser "than for the longer haul would be in no way responsive to "the conclusion that the rate for the lesser distance was un-"reasonable in and of itself. Such a decree would in effect "authorize the carrier to continue to charge at its election "a rate which was in itself unreasonable to the shorter "point" (East Tenn., &c., R'y *vs.* I. C. C., 181 U. S., 23).

Nor can it reasonably relate to the prevention of unjust discrimination.

"The only principle by which it is possible to enforce the "whole statute is the construction adopted by the previous "opinion of this court—that is, that competition which is

"real and substantial and exercises a potential influence on "rates to a particular point, brings into play the dissimilar- "ity of circumstances and conditions provided by the statute, "and justifies the lesser charge to the more distant and com- "petitive point than to the nearer and non-competitive place, "and that this right is not destroyed by the mere fact that "incidentally the lesser charge to the competitive point may "seemingly give a preference to that point, and the greater "rate to the non-competitive point may apparently engender "a discrimination against it. We say seemingly on the one "hand and apparently on the other, *because in the supposed "cases the preference is not 'undue' or the discrimination 'un- "just.'*"

"To compel the carriers to desist from all Nashville traffic "under the circumstances stated would simply result in de- "flecting the traffic to Nashville to other routes, and thus "entail upon the carriers who were inhibited from meeting "the competition, although they could do so at a margin of "profit, the loss which would arise from the disappearance "of such business without anywise benefiting the public" (East Tenn., &c., R'y *vs.* I. C. C., 181 U. S., pp. 18, 19, 20).

III.

The decision of the court of appeals of Kentucky in the case of the I. C. R'y *vs.* Commonwealth, decided October 25, 1901, and which is printed as an appendix to this brief, is a reiteration by that court of its doctrine that both in fixing rates generally and in regulating the rate adjustment over long hauls and short hauls, or otherwise, the action of the law-making power is final and not subject to any sort of review by the courts.

IV.

If the law-making power of the State can absolutely prohibit a perfectly legitimate branch of the railroad business, such as is involved in this case, when such a prohibition has no reasonable tendency to promote the public welfare, it can, of course, equally prohibit any other branch of the railroad business and equally hamper the essential discretion of the railroad company in the matter of adjusting its rates in other directions.

The iron-clad prohibition of charging more for a short haul than for a long haul, now contained in the Kentucky statutes, is utterly unnecessary to the prevention of extortion or unjust discrimination. Both these objects, so far as the adjustment of the long and short haul rates has a bearing upon them, could be fully accomplished by a law having the effect of section 4 of the Federal act to regulate commerce. A prohibition going to the extent of the Kentucky prohibition absolutely destroys traffic of vital importance to the railroad companies, when such destruction does not promote or tend to promote the prevention of either extortion or unjust discrimination.

V.

But even if an absolute and iron-clad prohibition of charging more for the short than for the long haul would be constitutional, notwithstanding its unjustifiable destruction of legitimate traffic of great value to the railroads and the public, it does not follow that it is constitutional to make the same prohibition coupled with purely arbitrary power of relief in the railroad commission.

If the ordinances considered in Yick Wo *vs.* Hopkins, 118 U. S., 356, had absolutely prohibited the conducting of a laundry business in frame buildings, the court might have been unable to say that such prohibition did not have a reasonable relation to the public safety. When, however, the prohibition did not have this effect, but left it to the arbitrary power of a board of supervisors to say when the laundry business could be so conducted and when it could not be so conducted, such a qualification negatived the idea that the prohibition was necessary to the public welfare, and, further, gave the final power of prohibiting or permitting the laundry business in frame buildings to a mere administrative board, without prescribing any rule as to how that power should be exercised, and thus made the scheme of regulation essentially inconsistent with the fundamental theory that ours is a government of laws and not of men. The court of appeals of Kentucky says that the Kentucky long and short haul law prescribes no fixed rule, but leaves the matter in each instance to the determination of the railroad commission. There is no pretense that any rule is laid down, or under the language of the law can be laid down, to govern the railroad commission in granting or withholding the privilege of enjoying the legitimate and valuable competitive traffic which is thus put under its absolute control.

VI.

In the case at bar, we are not confined to merely pointing out what injurious consequences *may* result from the construction put upon the long and short haul law by the court of appeals of Kentucky. The facts which appear in

this record show that the effect in this case is to deprive the plaintiff in error of a perfectly legitimate use of its property, when the use injures no one and when its prohibition helps no one, without any possibility of redress, if the law is to stand as construed by the court of appeals of Kentucky.

WALKER D. HINES,
For Plaintiff in Error.

APPENDIX.

KENTUCKY COURT OF APPEALS, OCTOBER 25, 1901.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
COMMONWEALTH OF KENTUCKY, *Appellee*.

Appeal from the Hardin circuit court.

Opinion of the Court by Judge Hobson.

Appellant was indicted in the Hardin circuit court, and fined $200.00 for charging more for hauling a car-load of coal from Deanfield, Kentucky, to Stevensburg, Kentucky, than from Deanfield through Stevensburg to Louisville. The indictment was returned June 10, 1899. At that time the railroad commission had not determined whether appellant should be exonerated as provided by the statute. The first question to be determined on the appeal is whether under the statute the carrier may be indicted by the grand jury before the railroad commission has refused to exonerate it. The statute is in these words (Kentucky Statutes, sec. 820):

"If any person owning or operating a railroad in this State or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court

of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission, and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (Kentucky Statutes, sec. 821) it is made the duty of the commission:

"To see that the laws relating to all railroads, except street, are faithfully executed;" and under this provision it would be the duty of the commission to see to violations of the preceding section. Not only so, but it is provided in section 820 that if the commission deems it proper to exonerate a carrier from the operation of its provisions an order to that effect shall be made, and after such order the carrier shall not be prosecuted for that matter. To indict the carrier in the first place without action by the railroad commission would be to deprive it of all benefit of this provision. If the commission had only power to pass on the same facts as the grand jury, it might, perhaps, be maintained that the legislature intended to provide a cumulative remedy and that a preliminary hearing before the commission was not essential. But such is not the fact. The statute is made pursuant to the following provision of the constitution (section 218):

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

In construing this provision in L. & N. R. R. Co. *vs.* Commonwealth, 20 R., 1380, it was held that the circumstances or conditions exempting the railroad altogether from the operation of the section did not include competition with other lines; and in the subsequent case of L. & N. Railroad Co. *vs.* Commonwealth, 21 R., 232, this ruling was adhered to; and it was further held that in such cases the power was vested in the railroad commission to exonerate the carrier. We said:

"It is urged that this construction of the constitution will allow coal and other freight from without the State to be shipped cheaper than they can be hauled to the same point if shipped within the State, as under the interstate commerce act competition is held to exclude the carrier from the long and short haul clause. The constitutional convention, no doubt, had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty and, no doubt, will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole be promoted."

It will be observed that the constitutional convention did not adopt a hard and fast rule making the charge of more for the short than for the long haul unlawful, but expressly empowered the commission to authorize the railroad to charge less for longer than for shorter distances, and to prescribe from time to time the extent to which the carriers might be relieved from the operation of the section. There were many industries in the State whose interests required this. More than one coal famine had occurred. The only security against a recurrence of this trouble was our domestic coal; but this could not be available unless given lower rates, so that it could compete in the market with coal shipped by water. If it could not thus compete, it could not be relied on as a supply in an emergency. The low rate in this case was given on coal shipped to Louisville,

because it there came in competition with the coal brought down the Ohio river. The railroad commission was the only tribunal authorized to relieve appellant from the operation of the section. No such power was vested in the courts. The question of competition could not be examined there, nor could it be shown that a proper case existed for exoneration from the section. The legislature, therefore, provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not, and, therefore, it was provided that if the commission relieved the carrier from the operation of the section no prosecution should be had on account of the matter complained of. It also further provided that if the commission failed to exonerate the carrier it should make an order in writing to that effect and furnish "a statement of the facts, together with a copy of its order to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense." The requirement that the commission should furnish the grand jury a copy of its order *in order that* the railroad company might be indicted for the offense must be read in connection with the previous clause, that if the company was exonerated the railroad company should not be prosecuted. The plain meaning of the two together is that the railroad company may be indicted for the offense if not exonerated, and may not be indicted if it is exonerated, and the copy of the order of the commission refusing to exonerate it is required to be furnished to the grand jury *in order* that the company may be indicted.

From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the

railroad and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see General Statutes, 1021), which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments.

The precise question raised in this case was before this court in the case of Louisville & Nashville Railroad Co. *vs.* Commonwealth, 21 R., 239. In that case the company had been fined under an indictment found at the request of the railroad commission, and one of the grounds of new trial was that the court had erroneously admitted the order of the railroad commission refusing to exonerate the company to be read to the jury on the trial, and it was insisted that this had prejudiced the defendant on the trial and caused a large fine to be assessed against it. The reading of the order of the commission was clearly prejudicial to the defendant, if improper. This court, however, affirmed the judgment and said:

"There was no error in allowing the order of the railroad commission to be read. This has in effect been determined by this court in the preceding cases."

The matter was not further elaborated at that time because it was considered concluded by the reasoning of the preceding case and the judgment on the former appeal (L. & N. Railroad Co. *vs.* Commonwealth, 20 R., 1380). It was proper to read the order of the railroad commission to the jury only because the statute required a copy of the order to be filed with the grand jury *in order that* the defendant might be indicted. It was the basis of the proceeding without which the prosecution could not be had. Upon a reexamination of the question we adhere to the conclusion then reached.

It is also insisted for the appellee that the statute thus construed is unconstitutional; but section 218 of the Constitution prescribes no penalty. What penalty should be imposed or when was absolutely within the discretion of the legislature. Without section 820, there is no provision of law for imposing a penalty, and if a penalty cannot be imposed under that section on the facts of this case, then there is no provision of law under which the prosecution can be maintained. We do not question the power of the legislature to provide for prosecutions without action by the railroad commission; we only determine that it has not done so by the provision quoted.

Thus construed, the statute does not seem to us in violation of any right secured by the Federal Constitution. The convention in framing the State constitution, if it had seen proper, might have made it unlawful to charge more for the short than for the longer haul under any circumstances. When it did not adopt an absolute rule to this effect, but allowed the carrier to be relieved from the operation of the section, this was more favorable to the carrier than an absolute prohibition would have been. The convention might have vested the power of exoneration in the legislature and authorized it by general laws to regulate the subject. When it created a special tribunal to determine when and under what circumstances the highways of the State might be

so used as to give some shippers preference over others it violated no right of the railroads, for the State in the exercise of its police power had the right to protect the people of the State from extortion and discrimination on the public highways constructed under the power of eminent domain and exercising franchises bestowed by the State. The right of due process of law secured by the Constitution does not extend to matters which at common law were not of judicial cognizance so as to require them to be tried now by the courts (Wulzen *vs.* San Francisco, 101 Cal., 15; 40 Amer. St. Rep., 17; Eames *vs.* Savage, 77 Me., 212; 52 Amer. Rep., 757; Weimer *vs.* Bunberry (Cooley, judge), 30 Mich., 201). The question, what tolls may be charged on a highway, or when or under what circumstances it would be right to charge more for the short than for the longer haul was not at common law of judicial cognizance, and the State has the right in the exercise of its police power to commit the decision of these questions to other branches of the Government than the judiciary. It may create special agencies for the determination of such matters and make their judgments final. Ultimate power must be vested somewhere. It cannot be assumed that the judiciary will be less liable to err than other departments of the Government.

Judgment reversed with directions to dismiss the indictment.

Whole court sitting. Chief Justice Paynter, Judges Guffy and White dissenting.

No. 98 Y.

Brief of Rives for D. C.

Office Supreme Court U.S.
FILED
NOV 12 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov 12, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

The Louisville and Nashville Railroad Company, Plaintiff in Error.

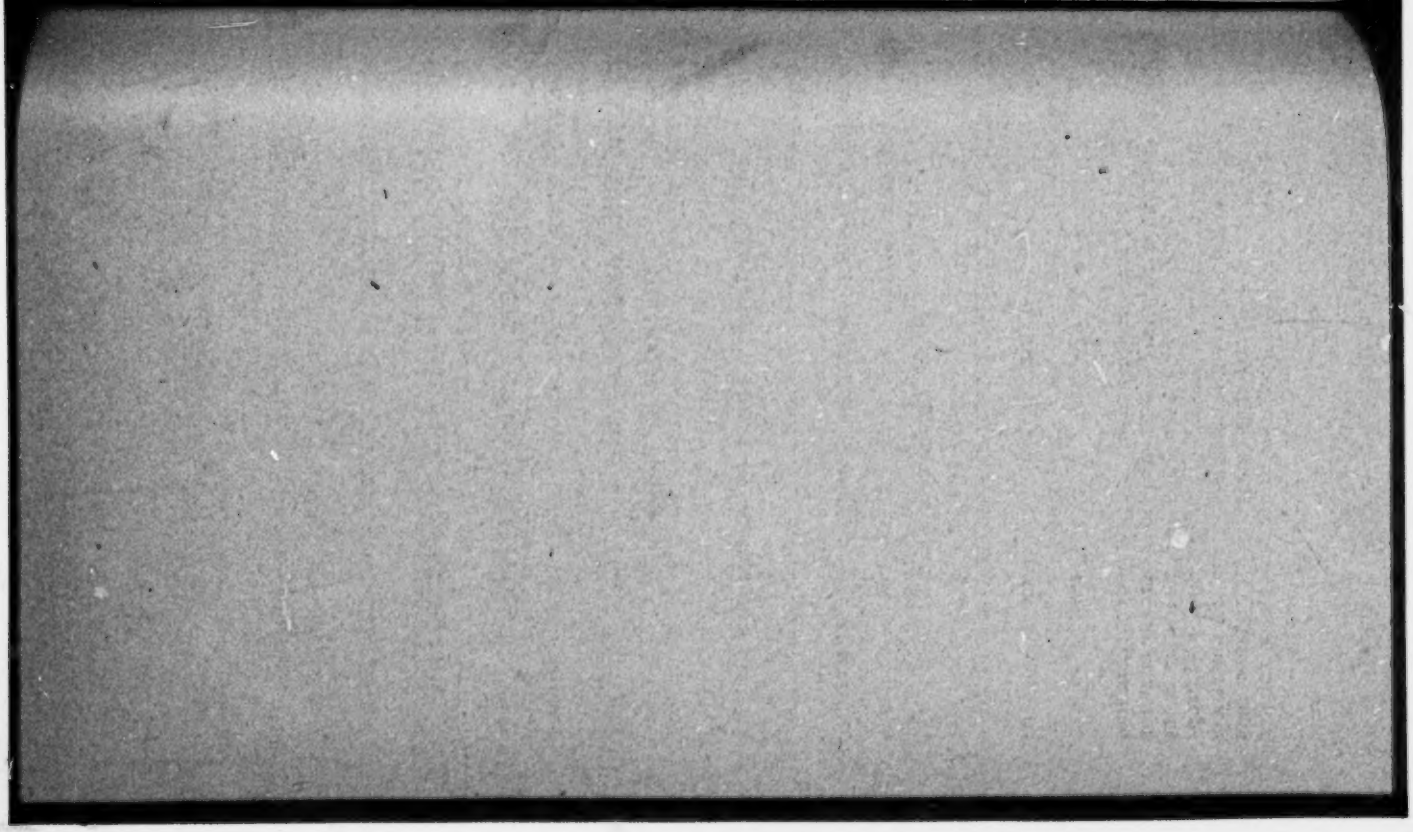
vs.

The Commonwealth of Kentucky.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Brief for Defendant in Error.

H. W. RIVES, of Counsel for Def't in Error.



Louisville and Nashville Railroad Company.	Plaintiff in Error
vs.	
The Commonwealth of Kentucky.	Defendant in Error

BRIEF FOR DEFENDANT IN ERROR.

The Louisville and Nashville Railroad Company, a coporation operating a railroad under charter granted by the legislature of Kentucky, was, upon the recommendation of the State Railroad Commission, indicted for violating section 218 of the constitution of that state. and section 820 of the Kentucky Statutes, which are commonly known as the Long and Short Haul law of Kentucky. The trial resulted in a judgment of conviction and a fine of $300.00, which, on appeal, was affirmed by the Court of Appeals.

From that judgment of affirmance a writ of error has been prosecuted to this court, and the question here presented for consideration is the alleged invalidity of the Long and Short Haul law of Kentucky, as being repugnant to the Federal Constitution.

The questions presented by the assignment of errors are:

1. That section 218 of the constitution of Kentucky, as construed by the courts of that state, deprives the carrier of his property without due process of law, and denies to it the equal protection of the law;

2. That it impairs the obligation of the charter contract between the Plaintiff in Error and the Commonwealth of Kentucky; and,

3. That it unlawfully interferes with commerce among the states.

The section of the Kentucky Constitution referred to is as follows:

"SEC. 218. It shall be unlawful for any person or corporation, "owning or operating a railroad in this state, or any common "carrier, to charge or receive any greater compensation in the "aggregate for the transfortation of passengers, or of prop- "erty of like kind, under substantially similar circumstances "and conditions, for a shorter than for a longer distance, over "the same line, in the same direction, the shorter being included

"in the longer distance: but this shall not be construed as "authorizing any common carrier, or person or corporation, "owning or operating a railroad in this state, to receive as great "compensation for a shorter as for a longer distance; *Provided*, "That upon application to the Railroad Commission, such "common carrier, or person or corporation, owning or operating "a railroad in this state, may in special cases, after investigation "by the Commission, be authorized to charge less for longer "than for shorter distances, for the transportation of passengers "or property; and the Commission may, from time to time, "prescribe the extent to which such common carrier, or person "or corporation, owning or operating a railroad in this state, "may be relieved from the operation of this section."

Section 820 of the Kentucky Statutes provides a penalty of not less than one, nor more than five hundred dollars for a violation of this provision, and imposes upon the Railroad Commission the duty of investigating the grounds of complaints made to them, and, if they fail, after investigation, to exonerate the carrier, they are required to report the facts to the proper grand jury that the penalties may be imposed.

The indictment in this case charges a violation of the constitution in that Plaintiff in Error demanded $1.55 per ton for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, a distance of about 80 miles, while its rate from Altamont, through Lebanon, to Louisville, about 147 miles, was only $1.00 per ton; and from Altamont to Elizabethtown, through Lebanon, the rate was $1.30 per ton. The whole route in each case, was within the state, and the Railroad Commission, in its order refusing to exonerate, expressly reserved the right "to suspend the operation of this order should said Company "(Plaintiff in Error) reduce its rates on said commodity from "said points of shipment to Lebanon, Kentucky, such reduced "rates to be approved by this board."

Plaintiff in Error declining to change its rates, or to apply to the Commission for approval of any lower rate to Lebanon, the indictment and conviction in the Marion Circuit Court followed such refusal.

ARGUMENT.

This Court will not question the construction of the Kentucky constitution as declared by the Court of Appeals of Kentucky, (*C. M. & St. P. R'y Co vs. Minn. 134 U. S. 418*), nor will it undertake to correct any supposed error of that court in applying a valid constitutional or statutory provision to the facts of the case before it: (*Central Land Co. vs Laxdely 159 U. S. 103*)

The judgment must be affirmed unless the provision of the Kentucky Constitution, on which the prosecution is based, be found repugnant to some provision of the Constitution or laws of the United States. If due process of law has been provided,

and the constitution, as construed by the Court of Appeals of Kentucky, would not, when fairly applied by the proper tribunals, deprive any carrier of the equal protection of the laws, this court will not assume to correct a merely erroneous judgment of those tribunals, and no such question can be raised in the case at bar in this court.

It is not, by any means, conceded by Defendant in Error, that any of the proceedings of the State tribunals were erroneous, but in view of the fact that the record is encumbered with a mass of offered testimony that was excluded and we think properly, by the trial court, and that an effort will probably be made in this court, as it was in the court of Appeals of Kentucky, to have this offered testimony considered as conclusive because uncontradicted, it may not be amiss to suggest that the Commonwealth was not called upon in the trial court to rebut or to contradict evidence that was not heard by the jury. The testimony was rejected by the trial court, because it was offered before the wrong tribunal, the Railroad Commission having exclusive jurisdiction to hear and consider it, under an application for exoneration from the constitutional enactment. It is significant that Plaintiff in Error did not offer the record of the evidence on *both sides* of the question, heard by the Railroad Commission on its investigation, from which it must be assumed that the Commission fairly and justly reached the conclusion that the discrimination between Lebanon and Louisville was unreasonable and not justified, to the extent claimed by Plaintiff in Error, by any circumstances of competition at Louisville, and that for this reason the Commission refused to sanction the difference in charges as made. In fact, the Commission in effect indicated that a reasonable excess in charge for the shorter haul would be allowed, if Plaintiff in Error would submit to the law of the State, while the extent of the excessive charge on which Plaintiff in Error insisted was unreasonable.

As construed by the Court of Appeals, section 218 of the Constitution of Kentucky was designed to take from the managers of railroad companies the exclusive right of deciding for themselves and for the public what difference in rates between different localities will be reasonable. It was the aim of the Constitution to require the railroads to treat all localities fairly and with equality. "However honest and faithful railroad man-"agers may be, they necessarily look first to the interests of "those they serve, and no principle of constitutional law is "violated when the State, which has created these agencies for "the public service, creates an impartial tribunal to prevent "their great powers from being used to build up certain favored "localities at the expense of others.... To hold that only railroad "men understand rates, or that they shall be allowed *alone* to fix "the rates, and that no tribunal can review their decision as to

"what rates are reasonable is to put in their hands a power "dangerous to the welfare of the community, and utterly out of "keeping with the doctrine that they are public agencies." (Opinion of Court of Appeals, Record pp. 83-84.) The Constitutional Convention, exercising the sovereignty of the State, in adopting section 218, declares that when all conditions of transportation service, except distance, are identical the carrier shall not charge one locality more for a shorter than another for a longer distance; it *does not fix a rate*, nor abridge the right of the carrier to charge a rate that will be sufficient to secure a reasonable profit on its investment, and reasonable compensation for its services to the public; the fixing of the rates for transportation is left to the carrier, under the general restriction that they must be reasonable; but when a rate is fixed as reasonable for a longer distance point, then, regardless of the amount so fixed by the carrier itself, an excess over that rate is declared to be an unreasonable and unjust discrimination against the shorter distance point, when all other considerations that affect the cost of the service are the same. It is not that the Constitution fixes the price of the loaf, nor that it requires the price to be proportioned to size, but because it says to the carrier, "You "shall not sell a half loaf for more than you charge for a whole "loaf of the same kind of bread," that Plaintiff in Error complains of an unreasonable interference with its rights of property. As applied to the case at bar, the State declares that if the carrier for any cause, fixes, as reasonable a rate, of $1.00 per ton for the transportation of coal 147 miles, it shall not be heard to claim in any court that $1.55 per ton is reasonable for the transportation of the same article in the same manner, at the same time, for only 80 miles, over the same route, in the same direction.

It is difficult to understand upon what grounds, consistent with the right of the State to regulate at all, this exercise of the police power can be considered as a departure form "due process of law," as "taking private property for public use without compensation," as depriving a carrier of the "equal protection of the laws," or as violating any restriction imposed by the Federal Constitution upon the exercise of sovereignty by the State.

This general regulation, so plainly just and reasonable, might in some special cases, seem to result in unnecessary hardship, as every police regulation will; but can it be declared, as a principle of law, that a court will substitute its standard of reasonableness, in any case, for that of the legislature, and even of the framers of our constitution, and refuse to enforce the plain requirements of the law for that reason alone? The wisdom or expediency of the law is not to be determined by the court, but by the legislative department. The real question at issue is not the expediency of the law but the power of the State to enact the law, and if the power exists the courts must enforce the law whatever

may be the individual views of the court as to its wisdom, or as to the soundness of the public policy indicated by the legislature. *Brass vs North Dakota, 153 U. S. 391.*

It may be possible that, in a particular case, the surrounding conditions will be so abnormal that the carrier could not continue its business without violating the plain rule of equality so enacted, but even in such a case, could a court rightfully assume the power to dispense with the law? If so, would not the same reasoning justify the court in permitting a carrier, in a special case, to charge in excess of a body of rates fixed by the legislature, and plainly reasonable for the service performed, yet insufficient in that particular instance to enable the carrier ro retrieve the effects of bad financial management?

The interests of the public are to be considered, and they are indeed paramount, for common carriers are given extraordinary privileges, including the right to subject private property for their uses, primarily for the benefit of the public, and whenever they cannot be profitably operated without oppressing the public, they should cease to operate at all.

In Covington & L. T. R. Co. vs. Sanford, 164 U. S. 578-598, this court said: "If the answer had not alleged, in substance. that the tolls prescribed by the act of 1890 were wholly "inadequate for keeping the road in proper repair and for "earning dividends, we could not say that the act was "unconstitutional merely because the company (as was alleged "and as the demurrer admitted) could not earn more than 4 "per cent. on its capital stock. It cannot be said that a cor-"poration operating a public highway is entitled, as of "right, and without reference to the interests of the public, to "realize a given per cent. upon its capital stock. When the "question arises whether the legislature has exceeded its con-"stitutional power in prescribing rates to be charged by a cor-"poration controlling a public highway, stockholders are not "the only persons whose rights or interests are to be consider-"ed. The rights of the public are not to be ignored.....The "public cannot be subjected to unreasonable rates in order "simply that stockholders may earn dividends. The legisla-"ture has the authority in every case, where its power has not "been restrained by contract, to proceed upon the ground that "the public may not rightfully be required to submit to un-"reasonable exactions for the use of a public highway estab-"lished and maintained under legislative authority. If a cor-"poration cannot maintain such a highway and earn dividends "for stockholders, it is a misfortune for it and them which the "constitution does not require to be remedied by imposing un-"just burdens upon the public."

In this case there is no pretense that plaintiff in error cannot comply with the constitutional provision, and at the same time,

so conduct its business as to make a profit on the investment; no pretense that obedience to the law would deprive it of any of its property; but only that the State cannot control it in its discrimination between localities, if a court of the State should be of opinion that the higher charge for the one locality would not, by itself, be unreasonably high. In other words that the State in the plenitude of its legislative power cannot declare a discrimination unjust nor even provide a special tribunal to determine the question, but is bound to establish a court, having exclusively judicial powers to determine the question of justice and reasonableness in all cases. It would seem that since the Railroad Commission cases, (*116 U. S. 307*) that have been so often cited by this court, and uniformly adhered to, the power of the State in this regard should be considered as settled. The police power is not judicial, but legislative; its exercise cannot be controlled by the court, unless it be plainly in violation of the settled principles of law that are recognized as inviolable under our system of government. In every case in which the attempted exercise of the power of legislative regulation of business affected with a public interest has been declared by this court to be inoperative, it has been upon the ground that it was "spoliation under the guise of regulation," that it deprived the owner of reasonable remuneration for the use of his property, and was, in effect, a destruction rather than a regulation of the use.

In a late case between the Plaintiff in Error and the Commonwealth of Kentucky (*161 U. S. 677-704*) this court said: "While there is no general reservation clause in the charter of "the L. & N. Co. we think, for the reasons stated in the "*Pearsall Case*, that under its police power, the people, in their "sovereign capacity, or the legislature as their representatives, "may deal with the charter of a railway corporation, so far as is "necessary for the protection of the lives, health and safety of its "passengers or the public, or for the security of property or the "conservation of the public interests; provided, of course, that "no vested rights are thereby impaired. In other words the "legislature may not destroy vested rights whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the "public health, safety or morals, we have frequently held that "corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection "of the public interests..... It has been too often held that "railways were public highways, and their functions were those "of the State, though their ownership was private, and that "they were subject to control for the common good, to be now

"open to question." See also *Smyth vs. Ames, 169 U. S. 466.*

And it would seem to be well settled that equal protection of the law is provided by "legislation, which, in carrying out a "public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated." *Barber vs. Connolly, 113 U. S. 27.*

When there has been question of the rates charged by common carriers, the matter of reasonableness has been left for judicial determination only where the legislature has failed to declare what is to be allowed as reasonable. After action by the legislature the power of the court is limited to enforcing the regulations enacted, or to an inquiry if they be so plainly unjust as to amount to spoliation, and therefore repugnant to the constitutional restriction. In every case the right of governmental control has been affirmed. Courts have no inherent power to control the legislature. The latter has plenary power to enact any laws deemed by it conducive to the good of the State: its discretion, in that regard, cannot be abridged or controlled by a coordinate branch of the government: the court is limited to the power of construing and enforcing the laws as enacted. It is only when the legislature has attempted a violation of some provision of the higher law, disregarded some restriction of its powers, expressly declared in the constitution, that the court in construing and enforcing the higher law, may declare the legislative act a nullity.

"Whatever is contrary to public policy or inimical to the "public interests is subject to the police power of the State, and "within legislative control, and in the exertion of such power "the legislature is vested with a large discretion, which, if exercised *bona fide*, for the protection of the public, is beyond "the reach of judicial inquiry." *L. & N. Ry. Co. vs. Commonwealth of Ky., 161 U. S. 677-704.*

Where the people of a State, in the exercise of their inherent powers of sovereignty, adopt a constitution, by which they distribute the powers of government among various tribunals created by them, the only restriction upon their power in that regard is that the government so formed shall be republican. They may commit to a single tribunal the exercise of administrative, judicial and ministerial functions, and may modify or even deny the right of trial by jury, without violating that provision of the Federal constitution requiring "due process of law." *166 U. S. 685. 163 U. S. 101, 160 U. S. 389.*

The regulation of its internal affairs is a matter exclusively within the power of the State, so long as it does not attempt to exercise any of the authority expressly prohibited to it by the Federal Constitution; and when an enactment is embodied in the organic law of the State, there can be no question of one department of the government encroaching upon another, but the

only inquiry open is whether the State as a complete sovereign entity, has been restricted by the higher law which limits its exercise of power only in so far as expressly declared.

If the State of Kentucky had declared that all railroad corporations created by it, and operating, as common carriers, lines of railroad between points within the State, shall charge for transportation of passengers or freight in proportion to the mileage traveled, without otherwise limiting the rates to be charged, does authority exist anywhere to declare such attempted regulation ineffective? If the State had required that, for transportation of passengers or freight, the charge should be proportioned to the actual service rendered by the carrier in the work of transportation, can it be that a power exists outside the State to declare such a regulation invalid? If so, the actual power of regulation left to the State would be a myth, a mere shadow, and the creatures of the State, in the fullness of their emancipation from governmental restraint, could defy their creators, and depend upon the strong arm of the Federal Government to sustain them.

The framers of the Kentucky Constitution, however, did not desire, though they had the power, to make of the long and short haul provision, an iron clad rule permitting of no exception. They realized the fact that cases might arise, where the force of competition, or other circumstances extraneous to the actual service rendered, but strongly affecting the general interests of the carrier, would seem to justify, without injury to the public, a somewhat greater charge for the shorter than for the longer distance.

The Legislature, meeting for a session of sixty days, once in two years, could not, from the nature of the subject, give that careful and intelligent consideration to existing conditions in every such case that would insure the carrier against unnecessary hardship and the public against imposition, and the courts as organized, would not have the time, if they had the special qualifications, for an investigation of commercial conditions, the details, of railroad management and expense, and all the various elements proper to be considered in rate making.

Whether the power of suspending the operation of the constitution, and providing a different and less exacting rule for a special case, be called legislative, judicial, or administrative, is unimportant in the case at bar. The Constitutional Convention had the power to establish a special court, or a special legislature to exercise the powers of sovereignty in such cases, and the vesting of such authority in the Railroad Commission was the act of the State, and can not be questioned, unless indeed, the State would have been prohibited from granting to any tribunal the authority delegated to the Railroad Commission. The only restrictions that could apply to the Railroad Commis-

sion in the exercise of the powers conferred upon it by the constitution of Kentucky, are those applying to the State itself, for in the exercise of those powers it represents, not one department of the State government, but the State itself; its credentials come, not from the Legislature in an attempt to delegate part of its legislative power, but direct from the people who, in creating it, were exercising their inalienable right to establish their own form of government.

A large discretion is permitted to the Railroad Commission, but it is no more arbitrary than would be the discretion permitted to the legislature if the Constitution had declared that the legislature might in special cases allow a greater charge for the shorter than for the longer distance and prescribe the extent of such excess; nor the discretion that would have been vested in the legislature had the Constitution been silent on the subject of long and short hauls.

Any tribunal entrusted with the governmental powers necessary to a proper regulation of the business of common carriers may, and probably will in some cases, err in judgment, but it by no means follows that it acts arbitrarily, nor that, because of the fallibility of human instruments, the power must not be exercised. Such reasoning would abolish all legislative and judicial tribunals. As was well said by this court in *Reagan vs. Farmers' Loan and Trust Co., 154 U. S. 362:* "It is not to be "supposed that the Legislature of any State, or a commission "appointed under authority of any State, will ever engage in a "deliberate attempt to cripple or destroy institutions of such "great value to the community as the railroads, but will always "act with the sincere purpose of doing justice to the owners of "railroad property, as well as to other individuals."

The Kentucky Constitution creates a tribunal, calling it a Railroad Commission, and committing to it, exclusively, by express provision, the duty of relieving common carriers from any hardship that might result, in special cases, from an enforcement of the law enacted to protect the public against rapacity and oppression, and to prevent unequal burdens being imposed on different localities.

Whether this duty be the exercise of the pardoning power, and therefore executive, or of the legislative power in declaring a rule of conduct in special cases, need not be determined, for in neither case is the exercise of power to be arbitrary, but only "after investigation." Just as the Governor investigates before exercising his official discretion in pardoning the commission of a crime, and may pardon *on conditions*, or as the Legislature investigates through its committees and other agencies before exercising its discretion in declaring exceptions to the law in certain cases, so the Railroad Commission, in the exercise of the executive or legislative discretion committed to it,

exclusively, on one subject, makes its investigation and satisfies itself: in each case the result is final, and the act of the State, in the sense that there is no higher tribunal in the State to review it. It is not necessary to inquire whether the courts could, in any case, or by any kind of proceeding, grant relief to the public from an order of the Commission, induced by improper or corrupt motives, exonerating a carrier from the operation of Sec. 218 of the Constitution; but it can not be claimed, with any show of reason, that the court may exercise a power of exoneration never committed to it where, as in this case, the carrier had not made application to the constitutional tribunal.

The constitution does not, as contended by Plaintiff in Error, exclude, in all cases, a consideration of competition in fixing rates, but it in effect declares that competition, of itself, shall not justify the carrier in violating the rule of equality prescribed. The carrier is not to have exclusive control over the rates for the long and short haul, nor the sole right to determine when competition exists, and to what extent special rates, for that reason, may be given, but an impartial tribunal is established to act as umpire between the railroads and the people, to investigate in every case, to consider the ever-varying conditions that obtain, and to decide when and to what extent the carrier may justly disregard the rule as to long and short haul charges. This constitutional tribunal has the exclusive power to suspend the operation of a particular constitutional provision; a power not shared by Governor, Courts or Legislature; and this power is delegated to be exercised by it *for the benefit* of the *carrier alone*, and never in any case, to increase the rigor of the law.

For the sake of argument alone, it might be conceded that if the constitution had made an iron clad rule prohibiting a greater charge for a shorter than for a longer distance, it would have been unconstitutional because of the hardships possibly resulting therefrom to the carrier in special cases; but when the same section has provided a tribunal, and prescribed the manner in which upon application by the carrier, relief from any such resulting hardship or injustice may be obtained, there can be no excuse or justification for ignoring that tribunal, and claiming that the constitution is void because the court refused to entertain the jurisdiction that was denied to it, and all others, save the Railroad commission.

It was not contended by plaintiff in error that an observance of the long and short haul law would have deprived it of all compensation for the use of its property, but only that the discretion of a carrier to charge any amount it may deem reasonable, or to make any discrimination it may deem reasonable, cannot be interfered with by the state save through a judicial tribunal, and if the gist of its contenotion is understood by counsel, it claims the right in the first instance to judge for itself and to act

on its judgment, in spite of constitutionals, legislatures or courts.

No application to the Railroad commission for exoneration was made by plaintiff in error, but complaint is now made that the trial court, having before it evidence that the Commission had investigated and refused to exonerate, declined to reopen the question and itself assume the power to exonerate. Plaintiff in Error did not undertake to impeach the action of the Railroad Commission: did not claim that it had declined to give due consideration to all the evidence presented to it: did not hint at fraud, nor did it offer the record of the testimony, on both sides, heard and considered by the Commission.

The latter tribunal, and its action, were ignored by plantiff in error, and the Court was urged to declare that, to entrust the determination of such questions to a Railroad Commission in any case, even by constitutional enactment, is an undue interference with the property rights of a Common carrier.

The Railroad Commission was not clothed with the power to act, without notice to and a hearing from the carrier, in fixing a body of rates that would be final and beyond the power of a court to examine, as in the case of *C. M. & St. P. Ry. Co. vs. Minn. 134 U. S. 418.*, nor had it power to impose any burden upon the carrier: to decrease any body of rates fixed by the carrier; nor declare any restrictions upon the exercise of its rights. The constitution declared the restriction, and the power of the Commission is confined to giving relief to the carrier, after investigation, when such relief may be sought by the carrier. The extent of any adverse action within the power of the Commission is to refuse the relief sought; not to increase the restrictions, but to leave the constitution to be enforced as it was adopted by the people. The command to investigate, when applied to by the carrier, necessarily requires of the Commission a full and fair consideration of every fact and argument presented by the applicant that could affect the interests of the carrier and of the public. What better warrant of authority would there be for the tribunal appointed to hear and consider such an application, if it were called a High Court of Equity, a Legislature, a Board of Pardons, or any other name than a Rrilroad Commission? And on what ground can the carrier complain that there is no provision for process to compel or even to notify it to apply for relief, when the law itself notifies it that the tribunal is always open and ready to hear any application it may desire to make? It was never intended by the constitutional provision requiring "due process of law" to deprive a state, or even the legislative department of a state, of the privilege of prescribing different remedies, or different methods of procedure for the enforcement or protection of rights, nor to restrict the state in the exercise of its police power. It could

not have been intended to restrict the state in its power to regulate the charges of common carriers for services rendered to the public, and to provide for equality of treatment of individuals and localities. In matters of judicial cognizance "due process of law" requires notice, an opportunity to be heard, before a tribunal which proceeds upon inquiry and renders judgment only after full investigation: the forms of procedure in different classes of cases varying as the legislature may provide. In matters of legislative cognizance, the enactment will always be upheld unless plainly oppressive and unjust when judged by the fundamental principles underlying our system of jurisprudence.

The legislature cannot be deprived of the function of determining what is a reasonable, just, and necessary regulation of the conduct of any business affecting the public welfare: its discretion as to the measures that are needed for the public good, is plenary and exclusive, and cannot be restricted unless in a particular case it plainly is not an exercise of discretion, but an effort to destroy,——the equivalent of confiscation. "Due "process of law in each particular case means such an exertion, "of the powers of government as the settled maxims of law permit "and sanction and under such safeguards for the protection of in- "dividual rights as those maxims prescribe for the class of cases to "which the one in question belongs." *Cooley on Constitutional Lim. 356-357. C. B. & Q. R. Co. vs. Chicago, 166 U. S. 240. Missouri Pac. R. Co. vs. Humes, 115 U. S. 512.*

In the case at bar there can be no question as to equal protection of the law, for no discrimination is made against any railroad company and "there is no evasion "of the rule of equality where all companies are sub- "jected to the same duties and liabilities under similar cir- "cumstances?" *Missouri Pac. R. Co. vs. Humes, supra.*

With as little reason can it be claimed that Plaintiff in Error is deprived of any right "without due process of law." The enactment is a valid exercise of the police power of the state, and does not attempt to abridge the right of any railroad company to fix and charge a body of rates that would produce sufficient revenue to maintain its road and equipments and pay a reasonable income on the value of the property. *C. & L. T. Co vs. Sanford*, 164 U. S. 589. The real objection to the Constitution of Kentucky, on the part of Plaintiff in Error, seems to be that the carrier is prohibited from acting as judge, jury and legislature in its own case, where its interests conflict with those of the public, and that an impartial tribunal is provided to investigate and fix the limits within which it may discriminate as between localities on its line. The question is in fact simply as to the existence of the right of governmental control in the regulation of railroads.

INTERSTATE COMMERCE.

If the Interstate Commerce Law should be construed to prevent the enforcement of section 218 of the Constitution of Kentucky, it would be difficult to ascertain what measure of control or regulation that a State may lawfully exercise.

The case is one of a corporation created by the legislature of Kentucky, to build and operate a railroad in Kentucky, being controlled by the State of Kentucky, as to discriminations between localities in the same state, in the transportation of a product of the state, on a line of road wholly within the state. It may be true that the enforcement of this regulation may induce the managers of the road, in seeking to make as much profit as possible, to change to some extent their charges on interstate traffic: but their threat to do so, or even their actual change of interstate rates, cannot be a limitation upon the power of the state to regulate, for the benefit of the public within the state, the intra-state traffic with which Congress has no power to deal.

When there was question of prohibiting the purchase of a competing road, and the Interstate Commerce law was relied upon to invalidate another provision of the Kentucky Constitution, this court said: "All such regulations (police regulations) interfere indirectly, more or less, with commerce between the "states, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of "transportation by the expense incurred in conforming to such "regulations." While it is true that the police power cannot be exercised "with respect to the commerce itself, it is not true "with respect to the instruments of such commerce.....It has "never been supposed that the dominant power of Congress "over interstate commerce took from the state the power of legislation with respect to the instruments of such commerce, so "far as legislation was within its ordinary police powers.....In "the division of authority with respect to interstate railways "Congress reserves to itself the superior right to control their "commerce and forbid interference therewith; while to the state "remains the power to create and to regulate the instruments "of such commerce, so far as necessary to the conservation of "the public interests." *L. & N. R. Co vs. Commonwealth of Kentucky, 161 U. S. 677.*

It was held in *Smyth vs Ames, 161 U. S. 466,* that a state might fix a schedule of rates to be charged on all intrastate traffic and that such regulation did not interfere with the Interstate Commerce law.

See also, *Hennington vs. Georgia,* 163 U. S. 299. *Osborne vs. Florida* 164 U. S. 650. *N. Y. & c R. Co. vs. New York,* 165 U. S. 628.

CHARTER CONTRACT.

The contention of Plaintiff in Error that it is exempt from legislative regulation by the state because of a supposed charter contract under which it has acquired the indefeasible right to exercise its own discretion in the management of its business, should be regarded as settled in the case of *L. & N. R. Co. vs. Commonwealth of Kentucky*, 161 U. S. 677, already cited. In that case there was question of power to prohibit the purchase of or consolidation with competing lines, while in the case at bar the question is as to the power of the state to prevent unjust discrimination between localities: the same reasoning applies to both cases.

However, since counsel for Plaintiff in Error have again presented the question, a due regard for them and for the court may demand a further consideration of the claim. *Stone, J. in Mobile &c., R. Co. vs. Stiner*, 61 *Ala.* 559, forcibly says:

"Railroads have so expedited and cheapened travel "and transportation, have so driven from their domain "all competing modes of transportation, that the public is left "no discretion but to employ them or suffer irreparable injury "in this age of steam and electricity. They have their estab- "lished rates of charge and these the shipper must pay or fore- "go all the facilities and benefits. To object or to protest "would be an idle waste of words, and the law looks to the "substance of things and does not require useless forms or cere- "monies. The corporation and the shipper are in no sense on "equal terms, and money thus paid to obtain a necessary ser- "vice is not voluntarily paid as the law interprets that phrase."

The citizen, then, would be completely at the mercy of a railroad corporation, if the legislature had the power, and at any time should assume to grant by contract to a railroad company the right to operate the public highway without interference from the State for the protection of the public.

If such an abandonment of the duty of protection on the part of the representatives of the State, can bind the State in its character as a sovereign, the citizens might soon find the powers of government bartered away from them by faithless agents, and held, under *inviolable contracts*, by corporations whose interests conflict with those of the public, their subjects.

The true principle under which alone the people can be secure in their property, and in their rights to life, liberty and the pursuit of happiness, rights that are inalienable, is that no set of representatives, selected by the people, at any time, to perform the duty of protecting those rights, and exercising the power of sovereignty, can delegate, by contract, that duty to others, nor cede the powers of sovereignty to individuals or corporations under any pretext, or for any consideration. The

police power is inherent in the people, and can not be bartered away without destroying the objects for which governments are organized. Whenever the protection of the public demands regulation of public agencies, the right and the power of legislating to that end exists. Representatives selected by the people to legislate for them were never entrusted with authority to destroy the power of the people to legislate for themselves, nor to transfer the power to irresponsible agencies.

In the *Lake Front cases, 146 U. S. 387*, Mr. Justice Field said: "The trust devolving upon the State for the public, and "which can only be discharged by the management and control "of property in which the public has an interest, can not be re- "linquished by a transfer of the property.... The State can no "more abdicate this trust over property in which the whole "people are interested than it can obdicate its police power in "the administration of government and the preservation of the "peace. In the administration of government the use of such pow- "ers may, for a limited period, be delegated to a municipality or "other body, *but there always remains with the state* the right to "revoke those powers and exercise them in a more direct man- "ner, and one more conformable to its wishes."

In *Georgia Railroad & Banking Co. vs. Smith, 128* U. S. *174*, Chief Justice Waite, in delivering the opinion of the Court, said: "So long as the use continues, the power of regulation "remains, and the regulation may extend, not merely to provis- "ions for the security of passengers and freight against acci- "dents and for the convenience of the public, but also to pre- "vent extortion by unreasonable charges, and favoritism by un- "just discrimination. This is not new doctrine, but *old doctrine, "always asserted whenever property or business is, by reason of "special privileges received from the government, the better to se- "cure the purpose to which the property is dedicated or devoted, affect- "ed with a public use.*" To the same affect, see *97 U. S. 25, 97 U. S 659, 101 U. S. 814, 161 U. S.* 677, *163 U. S. 299, 164* U. S *589, 164* U. S *650, 165* U. S. *628, 169 U.* S. *466.*

Whenever there has been claim of abandonment or abdication of the police power by reason of charter contract, this court has always found a sufficient answer to the claim by inspection of the words of the charter, and in every case thus far presented it has been held that the Legislature did not attempt to barter away the sovereignty of the State. It has not heretofore been necessary to the decision of any case for the court to go further than to say, as it did in *Stone vs. Farmers' Loan & Trust Co 116* U. S *307*, that "the power of regulation is a power of govern- "ment, *continuing in its nature, and if it can be bargained away "at all*, it can only be by words of positive grant, or something "which is in law equivalent;" in no case have there been found such "words of positive grant." It is not to be doubted

that should a case be presented in which a Legislature had attempted by "words of positive grant," to bargain away this "power of government, continuing in its nature," this court would be compelled by the settled principles of our government, to declare the attempt ineffective, as an exercise of power never delegated to the representatives of the people.

Whatever may be the provisions of the charter granted to Plaintiff in Error, there could not be a valid contract binding the State of Kentucky never to exercise its police power in regulating the use of the highway occupied by its railroad; but a proper construction of the charter will show that no such contract was ever attempted.

On March 5, 1850 the Louisville & Nashville Railroad Co., was incorporated for the "construction of a railroad from the city "of Louisville to the Tennessee line, in the direction of Nash-"ville," its capital stock was limited to $4,000,000.00: it was by §18 of the charter, granted "power to charge for tolls and the "transportation of persons, merchandise or property of any kind "whatever transported along said railway, any sum not exceeding "the following rates, to-wit: On all goods, merchandise or prop-"erty, for every one hundred pounds transported over 20 miles "and under 50 miles, 3½ mills for each mile; and for persons, "and every species of live stock, and every description of freight "or property, they shall charge no greater rate than is author-"ized to be charged on the railroad from Lexington to Frankfort."

By the 20th section of the act in-corporating the Lexington and Frankfort Railroad Company, approved Feby. 28, 1848, as amended by an act approved Feby. 26, 1849, that company had "power to charge for tolls and the transportation of persons, "goods, produce, merchandise, and property of any kind what-"ever transported by them along said railway between Lexington "and the Kentucky river *any sum* not exceeding the following "rates to-wit: For transportating any distance single packages "weighing less than 100 pounds, 25 cents, and at that rate "if such packages weigh more than 100 pounds; for transporting "goods, produce, merchandise or property of any kind. not more "than 4 mills per 100 pounds per mile; for transporting pass-"engers, not more than 4 cents per mile for each passenger with "his baggage, not weighing more than 40 pounds. But the "charge on coal shall at no time be fixed at a rate which shall "not yield a profit on its transportation." The Board of Directors were authorized to contract specially for the transportation of live stock, poultry and certain other enumerated articles, upon such terms as the parties interested might agree, not exceeding, save as to gold, silver bullion, money and nails, 15 per cent over the rates allowed for heavy merchandise or produce.

The charter of the Louisville & Nashville Railroad Com-

pany was amended six times before the general act of Feby. 14, 1857, reserving power to amend all charters and amendments thereafter granted. *Louisville Water Co. vs Clark*, 143 U. S. 1. *L & N. R. Co vs Commonwealth of Kentucky*, 161 U. S. 677.

On March 20, 1851. the Louisville & Nashville Railroad Co. was granted power to construct a branch road to the Mississippi river, and any other branch it might desire.

On Dec. 15, 1851, the Company was authorized to construct the main line of its road to the Mississippi river, or the Ohio below the Tennessee river or to connect with a road from Memphis, or with the Mobile and Ohio Railroad: and permission was granted to change the name to that of the "Louisville and South-estern Railroad Company."

On Jany. 9, 1852, authority was given to counties through which the road or its branches may pass, or any county contiguous thereto, to subscribe for capital stock in the Company.

On Feb. 24, 1854. an amendment provided for collecting taxes to pay county subscriptions of stock and, for representation of the city of Louisville and of subscribing counties in all elections of the Louisville & Nashville Railroad Company.

On March 7, 1854, the company was authorized to increase its capital stock to any amount not exceeding "the entire cost "of said road and its branches;" to redeem the bonds then issued, and to issue bonds under second mortgage to any amount not to "exceed one third the cost of said road and branches;" to "unite their road with any other road connecting therewith".

On Jan. 17. 1856. The Louisville & Nashville Railroad Company was authorized to issue bonds "to an amount not exceed-"ing three millions of dollars," and to execute a mortgage or deed of trust to secure their payment; no part of the money, thus raised, to be used "for any other purpose than that of con-"struction and equipment of the main stem of said road, con-"necting the city of Louisville with the city of Nashville." The company was authorized to guarantee the payment of interest and principal of county bonds delivered in payment of stock: to unite with any railroad company chartered in Tennessee for the construction of a bridge across the Cumberland river and useful conveniences for the transfer of passengers and freight from one road to another:

The Louisville & Nashville Railroad Company was authorized to issue bonds, "expressing on their face the purpose for "which they were executed," to obtain means to construct and equip any branch road; and all stock subscribed or means created to construct each separate branch should be faithfully applied to that purpose for the payment of these bonds the branch so procured should alone be liable: the rights, credits, property and profits

of each branch and of the main road were required to be kept in separate accounts, and could not be used or made liable for any or debts liability save of that portion to which they specially belonged.

The number of directors was increased from seven to nine, and the company authorized to make agreement for connection with any road chartered in Tennessee running part of the distance between Memphis & Louisville, to secure through transportation without change of cars or machinery between those cities, and "the said Louisville & Nashville Railroad Company "may in arranging a tariff of tolls, make discrimination on such "freight and travel as may run through from Louisville to "Memphis and from Memphis to Louisville, and such as may "run in part on their road, and transhipped to another." The Company was also authorized to extend any branch road, and purchase and hold any road constructed by another Company, and agree on terms "to receive the cars of other roads on "their said road, but shall charge for the same the usual freight."

Neither in the original charter, nor in any of the amendments prior to the general reservation statute of Feb. 14, 1856, is there any expression, even indirectly granting to the Louisville & Nashville Railroad Company, the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter distance points; no word indicating, in the slightest degree "a direct "contract with it exempting it from liability to future general leg- "islation in respect to" such discrimination, and it is well settled that, if it can be granted at all, "exemption from future general "legislation either by a constitutional provision or by an act of "the Legislature, can not be deemed to exist unless it is given "expressly, or unless it follows by an implication equally clear "with express words." *Pennsylvania Railroad Co vs. Miller, 132* U. S. 75.

The power conferred to charge for transportation, "*any sum* "not exceeding" certain named rates, did not justify discrimination in favor of longer over shorter distances; it is not necessary in this case to determine if the Legislature expressly abdicated the right of the State to fix a different maximm of tolls at a future time, under changed conditions of industry and commerce, but even that question should be regarded as settled against the company since the case of *Georgia Railroad and Banking Co. vs. Smith, 128* U. S. 174. That no charter provision was construed as authorizing discrimination between shippers oa localities on the main stem or any of its branches is clearly indicated by the expression found in Sec. 2 of the amendment of Jan. 17, 1856, authorizing discrimination, under certain circumstances, on the line between Louisville and Memphis alone.

After the enactment of the general reservation statute of Feb. 14,

1856, neither the Legislature of Kentucky nor Plaintiff in Error, believed that the Louisville & Nashville Railroad Company had authority, under any provision of its charter, to charge more for short than for longer distances, and when Plaintiff in Error determined that such discrimination might be of benefit to it, the Legislature was applied to for an amendment granting the privilege; the amendment was enacted Feb. 28, 1860, at the solicitation of the Company, and without any consideration to the State; it was simply a gratuity, a voluntary favor granted by the State to a favored corporation. By Sec. 1. of that amendment the Board of Directors were granted authority "in their "adjustment of a tariff for freight and passengers, to make dis- "crimination in favor of through freights and through passage, "and *in favor of freights and passage for long over short distances.*"

It will scarcely be contended that this amendment, enacted in 1860, four years after the general reservation statute, constituted an irrevocable contract on the part of the state, (*Louisville Water Co. vs. Clark, 143 U. S. 1. L. & N. R. R. Co. vs. Commonwealth of Ky., 161 U. S. 677*): and it is not credible that Plaintiff in Error would have solicited, or the legislature have expressly granted, with terms of more or less restriction, the privilege of doing something that was so essential in the business of conducting a railroad, that the state could not have forbidden it by a constitutional enactment.

Since the general reservation statute of 1856, the charter of the Louisville & Nashville Railroad Company has been amended not less than *twenty three* times by the legislature of Kentucky, in nearly every instance the amendment being applied for by the company. Under these various amendments, the separation of branch capital stock and branch indebtedness from that of the main line was abolished; the capital stock has been increased to at least fifty-five millions of dollars; immense issues of bonds have been placed upon the market, all restrictions as to the amount having been removed: large amount of stock in other railroads have been purchased: other companies have been consolidated with the Louisville and Nashville Company, while the original name has been retained: and now, instead of a struggling railroad company seeking to construct a road "extending from Louisville, in the direction of Nashville "to the Tennessee line," we find an immense corporation, owning and operating more than three thousand miles of railroad, paralleling the Ohio river, and spreading its web over the Southern States, from the Mississipi river to the Atlantic, from the Ohio river the Gulf of Mexico, and dominating the business of all that vast territory. It would require a violation of all just principles of construction to hold that privileges granted to the struggling infant of 1850-1856, may be retained and exercised, without the possibility of future legislative control, by

the giant of 1900, in all the new territory that it has added to its vast domain. While the name is the same, the Louisville & Nashville Railroad Company as it now exists is entirely different in every other particular from the corporation created in 1850–1856. Such consolidations with other companies, and acquisition of new lines of road have been held to create a new corporation, not possessing an immunity from taxation granted to the original company. *St. L. I. M. & S. R. R. Co.* vs. *Berry, et al, 113 U. S. 465-476. 8 Otto, 356-359. 5 Otto, 319-326.* In such cases there is not a merger of one into the other, nor a mere alliance or federation of the two. The charter amendment (Apr. 29, 1890) accepted and acted upon by the Company, authorized the Louisville & Nashville Railroad Company to consolidate with any other railroad company or companies whose road might connect with that of the Louisville & Nashville Railroad Company. The consolidation to be upon such terms as the companies may lawfully determine, and it "may "be so formed as to make the companies so consolidating *one* "railroad corporation or company, with a *consolidated stock and* "*property* and *one* board of directors to manage and control the "affairs thereof."

In *Atlantic & Gulf Railroad Co vs State of Georgia*, 8 *Otto*, *359—366*, two railroad companies were consolidated under provisions substantially identical with this amendment, the name of one of the original companies being retained, just as the name of the Louisville & Nashville Railroad Company has been retained after the various consolidations, by means of which the mileage owned and operated has been so largely increased. This court held that the effect of such consolidation was a new corporation, and that it was not a mere alliance or federation. "If it had been, each would have preserved its separate existence as well as its corperate name, but the act authorized the "consolidation of the two companies, thus making one capital "in place of two; it contemplated thereafter that the seperate "capital of each company should go out of existence, as the capital of that company, and if so, how could either have a continued separate being?.....The third section continued in "force the several immunities, franchises and privileges granted by the original charter and amendments, thereof, and the "liabilities therein imposed, but plainly for the benefit of the "consolidated companies."

RECAPITULATION.

To recapitulate, and condense the reasons urged against the contention of Plaintiff in Error, we submit that the judgment of the Court of Appeals of Kentucky must be affirmed:

1st. Because the long and short haul provision of the Constitution of Kentucky was enacted in the exercise of a power

vested in the State alone to prevent unjust discrimination between localities by railroad companies operating within the State; that it does not deprive Plaintiff in Error of the equal protection of the laws, because it applies alike to all railroads under similar circumstances; that it does not deprive any railroad of any part of its property, or of its legitimate earnings, but merely forbids a discrimination that the railroad companies could not lawfully make without express legislative authority; that the propriety of granting or withholding the right to discriminate in favor of long over short hauls is exclusively for the consideration of the legislative department and can not be controlled by the court.

2nd. Because no provision of the charter of the Louisville & Nashville Railroad Company purported to grant such right of discrimination until 1860, at which time the general reservation act of Feb. 14, 1856 was part of the charter, and the amendment of 1860 was, under that act, subject to repeal at any time; and that the amendment of 1860 was enacted at the instance of the Plaintiff in Error as a gratuitous concession, without any consideration.

3rd. Because, under no circumstances could the Legislature, by contract, abdicate or barter away the power of the State to legislate in the future to prevent unjust discrimination by common carriers, and

4th. Because, Sec. 218 of the Constitution of Kentucky does not interfere with interstate commerce, but merely prevents unjust discrimination between localities in the State, applying exclusively to intrastate traffic, and the instruments of commerce, over which Congress has no control. It is believed that the authorities presented conclusively sustain each of these several contentions, and an affirmance of the case is confidently asked.

Respectfully submitted,

H. W. RIVES,

For Defendent in Error.

Supreme Court of the United States.

No. 7.—October Term, 1901.

The Louisville and Nashville Railroad Company, Plaintiff in Error, vs. The Commonwealth of Kentucky. } In error to the Court of Appeals of the State of Kentucky.

[January 6, 1902.]

At the January term, 1895, of the Marion County circuit court of the State of Kentucky, an indictment was found against the Louisville and Nashville Railroad Company, a corporation of the State of Kentucky, for an alleged violation of section 218 of the constitution of the State, and section 820 of the Kentucky statutes, in charging more for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, than to Louisville and Elizabethtown, Kentucky, over railroads which the company were operating under its charter. The indictment alleged that it was filed upon the recommendation of the State railroad commission. The trial resulted in a judgment of conviction and a fine of $300, which, on appeal, was, on May 20, 1899, affirmed by the Court of Appeals. From that judgment of the Court of Appeals a writ of error was allowed by the Chief Justice of that court on June 28, 1899, and the case was brought to this court.

Mr. Justice Shiras delivered the opinion of the Court.

This case is here on a writ of error to a judgment of the Court of Appeals of the State of Kentucky, affirming a judgment of the circuit court of Marion County, Kentucky, sentencing the Louisville and Nashville Railroad Company to a fine of $300 for an alleged violation of a statute of that State, which declares, among other things, that it shall be unlawful for any person or corporation owning or operating a railroad in the State to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

This statute is based upon section 218 of the constitution of the State of Kentucky, adopted in 1891. The statute which is section 820 of the Kentucky statutes and section 218 of the constitution are set forth in

full in the report of the case of *McChord and others* v. *The Louisville & Nashville Railroad Comapny*, and cognate cases, recently decided by this court, and need not be here copied at length.

Those cases were here on appeal from final decrees of the Circuit Court of the United States for the District of Kentucky, enjoining the railroad Commission of the State from enforcing against the complainants, of which the Louisville and Nashville Railroad Company, the plaintiff in error in the present case, was one, the provisions of an act of the Commonwealth of Kentucky, approved March 10, 1900, entitled "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes, fron charging, collecting, or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions."

The occasion of the passage of this act of March 10, 1900, was a decision of the Court of Appeals of Kentucky holding that section 816, which declared that any railroad company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that State, was guilty of extortion, could not be enforced as a penal statute for want of certainty. (*Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132.)

The effort was made in the Circuit Court of the United States, and successfully, to have it held that by the said act of March 10, 1900, section 819, in so far as it provided an action by way of information, and to liability in damages, and that indictments should be made only on the recommendation or request of the railroad commission, was repealed by necessary implication; and that accordingly the order of the commission, fixing the rate, toll or compensation they may charge, was self-executing, and that no duty to enforce it was imposed on the commission; that the railroad companies were shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; that on the trial indictments for failure to observe the rates made by the commission, the courts cannot entertain any inquiry as to the reasonableness of rates so fixed, because such inquiry is unwarranted by the statute, and therefore illusory and worthless; and that even if the question of constitutionality could be raised in defense, yet that if the order of the commission were permitted to be entered of record, the companies, if they did not comply, would be at once exposed to innumerable prosecutions and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute was upheld.

It was, however, held by this court that it was not the intent or effect of the act of March 10, 1900, to repeal those provisions of section 819, requiring indictments to be found only on the recommendation of the commission, nor to circumscribe, in this particular, the general duty of the commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the Court of Appeals of Kentucky in the case of *Illinois Railroad Company* v. *Commonwealth*, decided while the appeals from the decrees of the Circuit Court of the United States were pending in this court. In that case the railroad company was indicted under section 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the railroad company should be exonerated as provided in that section, and the Court of Appeals held that "to allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882, (see General Statutes, 1021,) which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments."

The conclusion reached by this court, therefore, was that the duty of enforcing its rates rests on the commission, and that there was no basis for interposition by a court of equity before the rates were fixed at all; and that whether, after the rates have been determined by the commission, their enforcement could be restrained, was a question not necessarily presented for decision in those cases; and, accordingly, the decrees of the Circuit Court were reversed with a direction to sustain the demurrer and dismiss the bills.

In the case now in hand, the indictment was found, not in advance of any action by the railroad commission, but on its recommendation. Hence, the question of the validity of the provisions of the constitution and laws of the State of Kentucky under which these proceedings were had, is properly before us. Of course, our consideration of it must be restricted to its Federal aspect; in other words, we are to inquire whether the State enactments, constitutional and statutory, in the particulars involved in this controversy, and under the construction given them by the Court of Appeals, are in conflict with the Fourteenth Amendment of the Constitution of the United States.

At the trial of the indictment it was not seriously disputed that the defendant company had, at the time and place alleged, charged and received, for the carriage and transportation of coal over its line of road, a greater compensation for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, without having been authorized by the railroad commission so to charge, and after the commission, upon investigation, had refused so to do.

But certain facts, which were alleged to show that the circumstances and conditions, under which the charges in question were made and received, were not substantially similar with those ordinarily obtaining, and thus to show that the charges objected to were just and reasonable, were offered in evidence by the railroad company, and excluded from the jury by the trial court, which gave to the jury what amounted, in legal effect, to a peremptory instruction to find the defendant company guilty as indicted. The jury accordingly returned a verdict of guilty, fixing the fine at $300, for which judgment was rendered, and an appeal was taken by the defendant company from that judgment to the Court of Appeals.

It was contended, in the courts below and here, that as section 218 of the constitution of the State of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the interstate commerce act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the Federal courts, and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the State.

Such contention might seem reasonably to have been urged in the State courts, but as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the State enactments to be that found in them by the State courts. The prevailing view in the Court of Appeals was thus expressed by Judge Hobson:

"Appellant transported coal from Altamont to Louisville at $1.00 per ton, and to Elizabethtown at $1.30 per ton, while it charged $1.55 per ton from Altamont to Lebanon, an intermediate station on the line of its road. Complaint being made to the railroad commission, it investigated

the matter, and made an order in writing declining to exonerate appellant from the operation of the provisions of section 820, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecutes this appeal to reverse the judgment imposing a fine upon it of $300.

"Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio River on boats, and that at Elizabethtown, it came in competition with western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to non-competitive points like Lebanon were reasonable, and were unaffected by the reduction referred to, which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial, on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of section 218 of the constitution. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another, and we are referred to numerous decisions of the Federal courts so holding. On the other hand, it is contended for the State that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

"The precise question thus presented was determined by this court in the case of *Louisville & Nashville R. R. Co.* v. *Commonwealth*, (20 Ky. Law Reporter, 1380,) where the construction adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation."

In order to fully understand the position of the Court of Appeals it may be well to quote a portion of the opinion of that court in the case of *Louisville & Nashville R. R. Co.* v. *Commonwealth*, (20 Ky. Law Rep. 1380,) referred to in the court's opinion in the present case:

"The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from the operation of the section. In our opinion the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit suspension or relaxation in special cases. While the commission is thus, and to that extent, free from judicial interposition, it cannot of course nullify or, except in special cases, at all suspend operation of section 218; and though the railroad commission be invested with this unusual power, it must be treated as a constitutional power with which the court cannot interfere."

With the meaning thus attributed to section 218 of the constitution, it is strenuously contended on behalf of the plaintiff in error "that said section has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undercharges, or the promotion of the safety, health, convenience or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is, therefore, in conflict with the Fourteenth Amendment of the Constitution of the United States; and since the railroad company has built its railroads in the State of Kentucky, upon the faith of a charter granted it by the State authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such a construction of section 218 would impair the obligation of that contract."

To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretence of regulating fares and freights, a State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. (*Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 455; *Chicago &c. R. W. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *L. S. & M. Rl. Co.* v. *Smith*, 173 U. S. 684.)

We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without

due process of law, it would doubtless be our duty to furnish the relief asked for. Nor, yet, are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal courts to interfere with the legislative department of the State government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable.

As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the circuit court of Marion County, and when the Court of Appeals disposed of it, no power in the railroad commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the commission by the act of March 10, 1900, and it was to restrain the railroad commission from taking action under that act that bills in equity were filed by the Louisville and Nashville Railroad Company and other railroad companies in the Circuit Court of the United States. But in the present case, we have only to do with the question of the validity of the action of the railroad commission's proceeding under section 218 of the constitution and section 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when authorized by the commission to charge less for longer than for shorter distances. As we have seen, this court held, on the appeals from the Circuit Court of the United States, that it was not competent for courts of equity to interfere with the action of the commission in respect to fixing rates before the rates were fixed at all, and when it could not appear whether the companies would have any reason to complain of them.

Our present duty is to consider only the objections to the validity of the long and short haul clauses in the constitution and the statutes.

It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a State and its citizens.

This court then is not concerned with the wisdom of the people of Kentucky when they declared in their constitution that it should be unlawful for any person or corporation, owning or operating a railroad in that State, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the Court of Appeals of Kentucky erred in so construing

that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the constitution and statutes, deprives the plaintiff in error of its property without due process of law and denies to it the equal protection of the laws.

When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that, in a given case, a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But, apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a State, we are unable to see how such a company can successfully contend that it can be exempted by the courts from the operation of the constitution of the State.

It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the State, yet that their ownership of such roads is *property*, and, as such, is protected from arbitrary interference by the State. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character the company would be without the protection which courts of equity have heretofore given in cases of that description. What we now say is, that a State corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the

Federal courts, in respect to the long and short haul clause in the State constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but, however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

It is further contended that the indictment and proceedings in this case were void, because of the nature of the proviso in section 218 of the constitution. That proviso is in the following words: "Provided, that upon application to the railroad commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

The argument is that "even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to entrust the dispensation of the right to engage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will, in any and all cases, without judicial review or control."

But if it be competent for the State, as this argument supposes, to wholly forbid, in every case, and by every carrier, the charging of more

for a short than a long haul, it is not easy to see why the State may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. Such a provision is *ex gratia*, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation. Such an exercise of discretion by the railroad commission would be no more arbitrary than if the constitution had authorized the legislature to allow in special cases a greater charge for the shorter than for the longer distance, and to prescribe the extent of such excess. We are not prepared to accept the view that the railroad commission, in acting under section 218, is merely an administrative body, and as such subject to judicial review. It is rather a constitutional tribunal, empowered, *upon the application of the carrier*, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects to resort to the commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void. (*Shoemaker* v. *United States*, 147 U. S. 282, 305.)

The plaintiff in error did not choose to avail itself of the right to apply for relief to the railroad commission, perhaps for the reason that doing so might be regarded as an acquiescence in or waiver of the right to object to the validity of the proviso.

However this may be, it is difficult to see how a Federal question is presented by the apprehensions which the plaintiff may entertain that a resort to the commission might be futile. As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the constitution, and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition

that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the State in its constitution. (*Munn* v. *Illinois*, 94 U. S. 113; *Davidson* v. *New Orleans*, 96 U. S. 97; *Railroad Commission Cases*, 116 U. S. 307.)

We are next to inquire whether the plaintiff in error has been exonerated from these constitutional conditions and regulations by a valid contract subsisting between it and the State.

We do not understand that the counsel for the plaintiff in error claims that, by any provision of its charter, power was given to the company to fix its own rates of charge, or to discriminate in its rates between different places on its line of railroad, and that the constitutional prohibition as to the long and short haul, subsequently enacted, operates, if enforced, as a withdrawal or defeat of that power.

No right, in express terms or by necessary implication, is pointed in the company's charter, granting to the Louisville and Nashville Railroad Company the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter distance points. On February 14, 1856, there was passed a general act reserving to the State an unlimited power to amend all charters and amendments thereafter granted. (Laws of Ky. 1855–6, c. 148.) It is true that an amendment to plaintiff in error's charter was granted by an act passed February 28, 1860, by section 1 of which the board of directors were granted authority "in their adjustment of a tariff for freight and passengers, to make discrimination in favor of freights and passage for long over short distances." But it does not seem to be contended that by this amendment of 1860 an irrevocable contract was effected between the State and the company, which could not be affected by a subsequent constitutional enactment. It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be deemed to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.

But what is claimed is that a railroad company, by mere force of its legal organization and the construction of its road, has a necessarily implied power to fix reasonable rates, and especially has the right to differ rates when competition exists from rates applicable where there is no competition. Such rights, it is said, are essential to enable the company to engage in perfectly legitimate business, and hence that an interference therewith, even by a constitutional enactment, not only deprives the company of its property, or the reasonable use of it, but also impairs the obligation of the contract implied in the grant of its charter.

So far as the question of an implied contract is concerned, we perceive no distinction between the case of a railroad company incorporated before

and that of one incorporated after the constitutional enactment in question. As it has been said of the one so it may be said of the other, that the charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.

In *Pennsylvania R. R. Co.* v. *Miller*, (132 U. S. 75,) it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the State and the company as exempted the latter from the operation of the subsequently adopted constitution of Pennsylvania; that a constitutional provision, as applied to the company, in respect to cases afterwards arising, did not impair the obligation of any contract between it and the State; and that the company took its charter subject to the general law of the State and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

The same principle was announced in *Louisville Water Co.* v. *Clark*, (143 U. S. 1,) and in *Louisville & Nashville R. R. Co.* v. *Kentucky*, (161 U. S. 677.)

In the absence, then, of any express prior contract between the State and the company, exempting the latter from future constitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the State, it is sufficient to say that we do not find in section 218 of the constitution of Kentucky any impairment of an existing contract between the State and the plaintiff in error.

The final contention, that section 218 of the constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long.

It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.

It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect

of enforcing the police powers of a State. (*Erie R. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 439; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150.)

A discussion of this subject will be found in the opinion of this court in *Louisville & Nashville R. R. Co.* v. *Kentucky*, (161 U. S. 701,) where the same conclusion was reached.

The judgment of the Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.